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THE PLACE OF AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH

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INTRODUCTION

For the past few years the Supreme Court has been struggling with issues of government structure so fundamental that they might have been thought textbook simple, yet with results that seem to imperil the everyday exercise of law-administration. Under what circumstances can Congress assign the adjudication of contested issues in the first instance to tribunals that are not article III courts? The past century has witnessed the profuse growth of legislation assigning to special adjudicative tribunals—administrative agencies and other article I courts—the power to hold trial-type hearings that might otherwise have been placed in the article III courts. Yet in a case challenging such an assignment in the context of the bankruptcy laws,¹ the Court could not summon a majority to agreement on an opinion. The plurality found the assignment unconstitutional employing reasoning that, despite its best efforts, appears to threaten much administrative adjudication and revive ghosts long thought quieted,² while the dissent opined in the face of intellectual difficulties

1. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

2. *Id.* at 76–82 (apparently reviving *Crowell v. Benson*, 285 U.S. 22 (1932)). For commentary on the significance of *Crowell*, see Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. Pa. L. Rev. 163 (1949); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 324–60 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 277–96 (7th ed. 1979); L. Jaffe, *Judicial Control of Administrative Action* 87–94, 624–53 (1965).

with the governing language of the Constitution that it is "too late" to rely on the constitutional text.³

Can Congress empower bodies other than itself to adopt statute-like rules that acquire the force of law without either receiving bicameral passage in Congress itself or facing the possibility of presidential veto? Article II legislators—that is, executive rulemakers—have been acting at least since the turn of the century as if Congress could so empower them.⁴ Faced with challenges to congressional efforts to retain political controls over administrative rulemaking in the form of legislative veto provisions, the Court struck down the legislative veto in a formalistically reasoned opinion⁵ that struggled to avoid casting doubt on all rulemaking.⁶

What protection from litigious interference does the President have in his performance of office? The courts have recognized that congressmen, judges, and their aides require absolute privilege from civil liability for damage alleged to have resulted from their misperformance of office in order to protect their abilities to carry out central functions.⁷ Yet the Court was barely able to find a similar privilege in the President personally,⁸ and only one justice would have extended it to his closest personal aides.⁹ The resulting isolation of the Presidency may be understandable given the outrageous conduct apparently involved in those lawsuits—the firing by the President of a whistle-blower¹⁰—but exposes the Presidency to external controls and corresponding risks of internal hesitation the courts have seemed quick to oppose for the other branches.

At the root of these problems lies a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court.¹¹ When, for example, a federal agency adopts

3. *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

4. See *United States v. Grimaud*, 220 U.S. 506 (1911).

5. *INS v. Chadha*, 103 S. Ct. 2764 (1983); see Strauss, *Was There a Baby in the Bathwater?* A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L. J. 789.

6. See 103 S. Ct. at 2785 n.16.

7. *Butz v. Economou*, 438 U.S. 478, 508–14 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355–57 (1978); *Gravel v. United States*, 408 U.S. 606, 616–22 (1972).

8. *Nixon v. Fitzgerald*, 457 U.S. 731, 751–53 (1982).

9. *Harlow v. Fitzgerald*, 457 U.S. 800, 822–29 (1982) (Burger, C.J., dissenting).

10. But compare, as to the outrageousness of underlying conduct, *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge authorizes sterilization of minor girl in pro forma "hearing" on unexplored petition of parent).

11. Note that this Article is concerned only with administrative as opposed to political action—that is, with settings productive of "agency action" in the Administrative Procedure Act sense, the end result of a body acting as an "authority of the Government of the United States" in some manner directly affecting members of the public. 5 U.S.C. § 551(1), (13) (1982); cf. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (APA confers agency status only on administrative unit with substantial independent authority in the exercise of specific functions). We shall always be talking about governmental bodies in circumstances in which they are constrained to act under law enacted by Congress and subject to the possibility of judicial review. Government activities concerned with external relations and security are excluded from the inquiry.

a legislative "rule" following the procedures of the Administrative Procedure Act,¹² how is this act to be understood constitutionally? In a colloquial sense, the agency is acting legislatively—that is, creating general statements of positive law whose application to an indefinite class awaits future acts and proceedings. Validly adopted legislative rules are identical to statutes in their impact on all relevant legal actors—those subject to their constraints, those responsible for their administration, and judges or others who may have occasion to consider them in the course of their activities. Does it follow that in the constitutional sense what the agency is doing should be regarded as an exercise of the "legislative Powers . . . granted" by article I, "all" of which are vested in Congress? Or, given statutory authorization, is it to be regarded as an exercise of the executive authority vested in the President by article II, the judicial power placed in the Supreme Court (and statutorily created inferior courts) by article III,¹³ or authority merely statutory in provenance? The

This exclusion undoubtedly marks the largest part of executive authority as it might have been imagined by the political theorists on whom the drafters of the Constitution drew. Montesquieu, for example, describes as the "three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." C. Montesquieu, *The Spirit Of The Laws* 151 (T. Nugent trans. 1949). The third, which he called "the judiciary power," *id.* para. 2, exists to punish criminals and determine individual disputes. It was best performed by courts and juries. That left public security and foreign affairs as the primary domain of the executive. A somewhat broader vision can be detected in the pages of the *Federalist* papers, see e.g., *The Federalist* Nos. 70–72 (A. Hamilton), but foreign and military affairs draw the bulk of attention.

This exclusion also sets off that aspect of governmental functioning that tends least to share the characteristics of legislative and judicial action, that tends least to be subjected to judicial (if not legislative) controls, and of which we are least likely to demand the characteristic and safeguarding attributes of those two forms of action, such as definitive, public statement of governing norms or reasoned, disinterested decision.

Thus, this Article addresses behavior that, in historical perspective, is not at the core of executive function. The distinction between political and administrative government had its counterpart in early writings about administrative procedure suggesting a distinction between "executive power" and "administrative power"—the first, concerned with those issues Chief Justice Marshall had identified in *Marbury v. Madison* as "[q]uestions . . . in their nature political," 5 U.S. (1 Cranch) 137, 170 (1803); the second, strictly statutory, and subject to presidential participation only to whatever extent might be provided by statute. See the elegant discussion of the writings of Freund, Wyman, Willoughby and Goodnow in Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285 (1950). One need not accept the proposition about complete congressional control of "administrative power" to find force in the distinction. The administration of regulatory schemes has qualities different from the conduct of foreign relations, warranting provision for a different albeit palpable degree of presidential (and for that matter congressional and/or judicial) involvement. The central purpose of this essay is to examine the constraints that may exist on Congress's shaping of the administrative power.

12. 5 U.S.C. §§ 551(4), 553(c) (1982).

13. Federal courts have long been authorized by statute to adopt rules for the governance of proceedings before them, rules which have the force of law on those subject to them and those administering them, and in this respect questions parallel to those discussed in the text respecting agencies necessarily arise. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 15–16 (1825).

Constitution names and ascribes functions only to the Congress, President and Supreme Court, sitting in uneasy relation at the apex of the governmental structure; it leaves undiscussed what might be the necessary and permissible relationships of each of these three constitutional bodies to the agency making the rule. Is it significant for any of these purposes whether the rulemaking authority has been assigned to a cabinet department or to an independent regulatory commission? Indeed, does it make sense to look to the Constitution, written so many years ago, for contemporary guidance or limits on the sorts of arrangements Congress can make?¹⁴

Three differing approaches have been used in the effort to understand issues such as these. The first, "separation of powers," supposes that what government does can be characterized in terms of the kind of act performed—legislating, enforcing, and determining the particular application of law—and that for the safety of the citizenry from tyrannous government these three functions must be kept in distinct places. Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function. These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.

"Separation of functions" suggests a somewhat different idea, grounded more in considerations of individual fairness in particular proceedings than in the need for structural protection against tyrannical government generally. It admits that for agencies (as distinct from the constitutionally named heads of government) the same body often does exercise all three of the characteristic governmental powers, albeit in a web of other controls—judicial review and legislative and executive oversight. As these controls are thought to give reasonable assurance against systemic lawlessness, the separation-of-functions inquiry asks to what extent constitutional due process for the particular individual(s) who may be involved with an agency in a given proceeding

14. Cf. *supra* text accompanying note 3. The reader will probably divine without the help of this footnote with what suppositions I approach constitutional interpretation, yet it may be helpful to try to mark a spot for myself along the interpretivist–noninterpretivist continuum. My supposition is that the Constitution is law, binding judges (as it says it does) along with the rest of government. What was perhaps the framers' strongest proposition, that no part of government could be trusted free of the constraints of law, applies equally to the courts, even if they are the "least dangerous" among the branches. Danger may come, after all, not only from the harm one can accomplish directly, but from the disarray that can result from unsupported readings about the powers of others under a complex scheme that must be at once effective and safe.

That places me among the interpretivists, but within that field the reader will probably find me at least eclectic, if not undisciplined. I think it warranted to bring to the task of interpretation any information or skills a lawyer might properly use in understanding written text, and the idea of seeking contemporary rather than fixed meaning. The larger, underlying structural judgments of the document, see C. Black, *Structure and Relationship in Constitutional Law* (1969), have the greatest claim, in my view, to continuing adherence.

requires special measures to assure the objectivity or impartiality of that proceeding. The powers are not kept separate, at least in general, but certain procedural protections—for example, the requirement of an on-the-record hearing before an “impartial” trier—may be afforded.

“Checks and balances” is the third idea, one that to a degree bridges the gap between these two domains. Like separation of powers, it seeks to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle; the intent of that struggle is to deny to any one (or two) of them the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of government. Unlike separation of powers, however, the checks-and-balances idea does not suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue. From this perspective, as from the perspective of separation of functions, it is not important how powers below the apex are treated; the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence.

In the pages following I argue that, for any consideration of the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances. Almost fifty years of experience has accustomed lawyers and judges to accepting the independent regulatory commissions, in the metaphor, as a “headless ‘fourth branch’” of government.¹⁵ Although the resulting theoretical confusion has certainly been noticed,¹⁶ we accept the idea of potent actors in government joining judicial, legislative and executive functions, yet falling outside the constitutionally described schemata of three named branches embracing among them the entire allocated authority

15. The President's Comm. On Administrative Management, *Administrative Management in the Government of the United States* 30 (1937). They are, of course, not “headless”; all accounts of their functioning recognize that at least the courts and Congress remain superior—if not dominating—entities in their appropriate spheres.

16. See, e.g., Justice Jackson's dissenting statement in *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952):

[Administrative bodies such as the FTC] have become a veritable fourth branch of Government, which has deranged our three-branch legal theories . . . Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed.

of government. What would be the consequences of so viewing *all* government regulators? I believe such a shift in view would carry with it significant analytical advantages by directing our focus away from the truly insignificant structural and procedural differences between the “independent regulatory commissions” and other agencies to the relationships existing between each such agency and the three named branches. Each such agency is to some extent “independent” of each of the named branches and to some extent in relationship with each. The continued achievement of the intended balance and interaction among the three named actors at the top of government, with each continuing to have effective responsibility for its unique core function, depends on the existence of relationships between each of these actors and each agency within which that function can find voice. A shorthand way of putting the argument is that we should stop pretending that all our government (as distinct from its highest levels) can be allocated into three neat parts. The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches; its vitality, rather, lies in the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation.

Bits and pieces of history contribute to our assumptions about the place of agencies in government—most notably, that there is a something called an “independent regulatory commission” that is somehow different in what it does from a cabinet department, and that need have no relation with the President though it is strongly associated with Congress and the courts. These bits and pieces have led us astray. The Department of Agriculture and the Securities and Exchange Commission both adopt rules, execute laws, and adjudicate cases, all pursuant to statutory authority. Why is that not the forbidden conjoining of powers? The question has been more obscured than answered, perhaps, by describing what the agencies do as “quasi-adjudication” or “quasi-legislation,” as if the operations performed were in fact not the same three characteristic operations of government our eighteenth-century political theorists insisted must be kept separate for public protection. If the constitutional scheme were to require locating these agencies in one or another part of government, as more formalistic separation-of-powers opinions have sometimes hinted,¹⁷ which part would they be in? And how could they then be authorized to perform the functions associated with another part?

From the perspective suggested here, the important fact is that an agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control.¹⁸ Powerful and potentially arbitrary as they may be, the Secretary of

17. See *Id.*

18. For example, one may understand the delegation doctrine in this functional way, rather than as an indication “where” in government rulemaking occurs. That doctrine requires both

Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at its very top.¹⁹ What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.

Accommodating theory to the accepted present is perhaps the most difficult aspect of the task, given the highly political and informal cast of important presidential and congressional relationships with the agencies. Thus, a basic difficulty in writing about the President's legal authority over the affairs of government lies precisely in the infrequency with which that authority is tested in a legal rather than a political arena. Judicial pronouncements on presidential authority vis-a-vis the agencies, and vis-a-vis Congress, are few. But presidential dealings with Congress are daily matters of great portent, and congressional expectations about the relative authority of the President, Congress and the independents are both many and firmly established, and likely to be sharply enforced in the daily political moil.²⁰

The driving forces behind this effort include my puzzlement at the Court's difficulties and a lawyer's premise that any acceptable outcome (that does not involve constitutional amendment) must respect the Constitution's text and, at least in broad outline, its history. I hope to address the significant intellectual difficulties created by the realization that the relationship between the fact of the federal government we have today and its essentially unrevised

statutory authorization (a relationship with Congress) and a capacity on the part of the courts to assure legality (a relationship with the courts). The availability of at least limited judicial review, indeed, appears to be identified with increasing frequency as an essential element of the grant of rulemaking authority. See *INS v. Chadha*, 103 S. Ct. 2764, 2779-80 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 78-81 (1982).

19. For an account of the work of Goodnow and Willoughby strongly suggesting this differentiation between agencies and the named actors, see Grundstein, *supra* note 11, at 300-02. One must add that this checks-and-balances perspective deals only with the problem of control, and omits accounting for a "fairness" element that might be identified as central to the rationale for separation of functions—the proposition, long reflected in English ideas of "natural justice," that one is not to be a judge in one's own cause. See generally G. Wills, *Explaining America* 149-50 (1981). Perhaps it is sufficient to say that that element has never been controlling at the agency level; the *nemo iudex* idea is limited to financial and other sharply personal interests in English law, see H. Wade, *Administrative Law* 400 (4th ed. 1977), as well as our own, see *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), and *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) for an indication that even disqualifying financial interests may be asserted only in the context of particular adjudicatory proceedings. See generally Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 *Colum. L. Rev.* 990 (1980).

20. President Carter, like his predecessors, firmly denied the constitutional validity of the legislative veto, but in bargaining over continued authorization for the FTC he agreed to accept a form of legislative veto, 38 Cong. Q. 1148-49 (1980); 38 Cong. Q. 1407-09 (1980), and he kept that bargain. 38 Cong. Q. 1573 (1980). See also the comprehensive listing of presidential communications in Henry, *Legislative Veto: In Search of Constitutional Limits*, 16 *Harv. J. on Legis.* 735, 737 n.7 (1979).

eighteenth-century formal structure is uneasy at best; that it is difficult to accommodate both the fact of the changes and our continuing assertion that the Constitution is law.²¹

To achieve this accommodation, Part I of this Article describes contemporary government, with the purpose of identifying those aspects of the political landscape that any theory of the place of agencies in government must acknowledge. Part II examines the constitutional constraints—of text, of context, and of judicial interpretation—on Congress's ability to structure the work of law-administration as it deems best, in light of the three approaches just sketched and with the results suggested. I suggest a reinterpretation of some cases now taken as the basis for our analyses of government structure, and some criticisms of cases decided in the two terms of the Court just concluded. Part III then uses considerations of checks and balances and separation of functions to analyze relationships between the President and the agencies viewed without necessary regard for their placement in the governmental structure. I suggest that as Congress structures the government, it must recognize certain constraints—the need for basic parity between it and the President in political oversight of the agencies; and the President's substantial independent authority to communicate with and give directions to those who administer the laws. There emerges a framework for understanding the scope of Congress's authority to structure American government that stresses the continuance of opposed, politically powerful actors at the apex of government by requiring that those who do the work of law-administration have significant relationships with each.

I. THE SHAPE OF CONTEMPORARY ADMINISTRATIVE GOVERNMENT

This Part of the Article seeks to describe the ways in which contemporary federal government is structured and performs its law-administration functions.²² The effort proceeds from the premise that any useful legal analysis of the limits on Congress's ability to structure administrative government must, at least in large measure, accept the reality of the existing government. To no one's surprise, the description reveals a profuse variety of formal structures and a striking dispersion of governmental authorities. Both the variety and the dispersion are inconsistent with any notion that the powers of government are or can be neatly parcelled out into three piles radically separated the one from the other and each under the domination of its particular "branch."²³ Once one descends below the level of the branch heads named in the Constitution—Congress, President, and Supreme Court—separation of powers ceases to

21. See Karl, *Executive Reorganization and Presidential Power*, 1977 Sup. Ct. Rev. 1, which also in somewhat mystic phrases illustrates and seeks to reason from the clash between politics and administrative science in the relations between President, Congress, and the continuing body of civil servants.

22. See *supra* note 11.

23. See *supra* note 15.

have descriptive power. Because agencies nonetheless exist in varying relationships with each of these paramount actors, the notion of checks and balances retains descriptive power and, hence, possible utility within the constraint of accepting the reality of the existing government.

However one counts its branches, the size alone of contemporary American administrative government places strains on the eighteenth-century model. The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each headed by a Secretary responsible to the President and thinly peopled with political employees. Significant regulatory responsibilities were not in view; administration even of the public lands was decades in the future.²⁴ The eighteenth-century model relied heavily on the controls of politics over and among the branches of government to keep it within reach of the people, to subdue the risks of tyranny.²⁵

The simple model of cabinet departments has long since been supplanted by a rich variety of governmental forms. Today, President and Congress must each deal with a continuing government whose dimensions and power were unprovided for. The civil service, largely insulated from politics, may appropriately be regarded as the fourth effective branch of government²⁶ wholly without regard to the arguably special position of the independent commissions. The character of bureaucratic decisionmaking has also changed. In the modern bureaucratic context, politics is paradoxically suspect. The notions of administrative science, for example, that governmental policy could be made by objective analysis performed outside the world of politics, may have found their first foothold with the independent commissions; yet today's technological rulemakings, occurring primarily within the executive branch, are strongly influenced by those notions.²⁷

24.

[T]he conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that followed the Civil War. The framers had no reason to envisage the management of an industrial nation as the essential function of the office . . . [or to] forecast the development of extensive managerial bureaucracies to tend to social policy and related problems.

Karl, *supra* note 21, at 11.

25. See *infra* text accompanying notes 102–18.

26. K. Meier, *Politics And The Bureaucracy: Policy-Making In The Fourth Branch Of Government* (1979); H. Merry, *Five-Branch Government* 59–60 (1980); E. Hargrove, *The Power of the Modern Presidency* 79 (1974).

27. At the same time as the past behavior of agencies is criticized for its want of responsiveness and responsibility and for the failures of cocooned expertise, pressure for more rationalistic and “objective” modes of decision also mounts. Detailed cost, risk, and benefit analysis techniques are put forward as alternatives to “visceral estimates and political accommodations,” L. Lave, *The Strategy of Social Regulation* 6 (1981), as the basis for policy decision. Interest-group representation in the courts, through expanded judicial review, is urged as a means of securing public accountability for agency action. Stewart & Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1195 (1982).

The following four propositions identify the significant features of modern administrative government that any structural account based on the Constitution must encompass:

1. The federal agencies are placed in the structure of federal government—as cabinet agencies, independent executive agencies, or independent regulatory commissions—without apparent regard for the functions they are to perform. Their internal and public procedures do not vary with their placement. The functions they perform belie simple classification as “legislative,” “executive,” or “judicial,” but partake of all three characteristics.

2. All agencies, whether denominated executive or independent, have relationships with the President in which he is neither dominant nor powerless. They are all subject to presidential direction in significant aspects of their functioning, and able to resist presidential direction in others (generally concerning substantive decisions).

3. All agencies have oversight relationships with Congress and the federal judiciary, and these relationships generally do not vary with the type of agency used.

4. The characteristics of the oversight relations of President and Congress with “executive” and “independent” agencies owe as much (or more) to politics as to law.

The pages immediately following take up each proposition in turn, necessarily with a broad and merely evocative brush. Some readers may be satisfied with the propositions; they should turn at once to page 596. Yet one's impression is that many assume radical differences between executive agencies and independent regulatory commissions in functions, procedures, and relationships with the rest of government. Acknowledgement both of the variety of forms government regulators take and of the similarity of their actions and control relationships is important as a point of departure for the later discussion.

A. The Independence of Agency Function, Placement, and Structure

Congress has employed many different forms of governmental authority in allocating the day-to-day work of government. It has created cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations,²⁸ independent regulatory commissions within cabinet depart-

One may fairly wonder at the wisdom of the radical exclusion of politics some thus seek. Cost-benefit analysis can inform but not resolve human equations pitting the manifold interests of various groups against one another. Invoking the judgment of lifetime appointees is a curious means for introducing democratic controls over agency functioning. The failures of administrative science to produce effective public policy might also be traced to the faulty premise that one can somehow free government of politics without also freeing it of responsibility to the people and responsiveness to those they directly select to represent their interest. Refusal to recognize the possibility of political controls over the bureaucracy's decisions, whatever the advantages of that refusal, tends to place sole reliance on the judiciary for the bureaucracy's connection with constitutional governance.

28. See, e.g., 16 U.S.C. § 831–831dd (1982) (Tennessee Valley Authority).

ments,²⁹ and more as means of carrying into execution the laws it enacts. And each of these bodies may itself be highly complex—an amalgam of agencies, administrations, offices, bureaus, and services, each headed by its own chief possessing statutory authority yet reporting to an assistant who reports to the agency head.

The allocation of law-administration among these forms does not follow simple functional lines. Although administrative law students and others sometimes talk uncritically as if the performance of regulation were a lodestone—as if all regulatory agencies were “independent regulatory commissions”—regulatory and policymaking responsibilities are scattered among independent and executive-branch agencies in ways that belie explanation in terms of the work agencies do.³⁰ Take, for example, workplace safety: the Mine Safety Act³¹ is wholly administered by an executive department, at first the Department of the Interior and more recently the Department of Labor; the Occupational Safety and Health Act is administered in part by an executive agency, the Occupational Safety and Health Administration, and in part by an independent commission, the Occupational Safety and Health Review Commission, both placed in the Department of Labor;³² nuclear safety is in the charge of a fully independent agency, the Nuclear Regulatory Commission.³³ Similar dispersions could be noted respecting antitrust policy,³⁴ economic policy,³⁵ consumer protection from fraudulent advertising,³⁶ and even rate regulation.³⁷ The diversity is characteristic of our pragmatic ways with

29. See, e.g., Occupational Safety and Health Review Commission, 29 U.S.C. §§ 651-678 (1982) (in the Department of Labor); Federal Energy Regulatory Commission, 42 U.S.C. §§ 7171-7177 (Supp. V 1981) (in the Department of Energy).

30. That reality was well understood by the late Nathaniel Nathanson, whose essay *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the “Independent” Agencies*, 75 Nw. L. Rev. 1064 (1981), looks in much the same direction as this one.

31. 30 U.S.C. §§ 721-740 (1982).

32. 29 U.S.C. §§ 656, 661 (1982).

33. 42 U.S.C. §§ 5841-5851 (1976 & Supp. V 1981).

34. 15 U.S.C. §§ 45, 46 (1982) (Federal Trade Commission); 15 U.S.C. §§ 4, 25 (1982) (Department of Justice).

35. Council of Economic Advisors (White House), the Department of the Treasury, and the Federal Reserve Board.

36. Federal Trade Commission, 15 U.S.C. §§ 52, 53 (1982); Department of the Treasury, 27 U.S.C. § 205(f) (1982) (intoxicating liquors); 27 C.F.R. §§ 4.1-4.80 (1983) (wines); and the Food and Drug Administration (Department of Health and Human Services), 21 U.S.C. §§ 301-392 (1982).

37. Federal Energy Regulatory Commission (Department of Energy), 42 U.S.C. § 7173(c) (Supp. V 1981); Department of Agriculture, Regulations Under the Packers and Stockyards Act, 9 C.F.R. 201.17-201.200 (1983) (packers and stockyards); Interstate Commerce Commission, 49 U.S.C. §§ 10,701-10,702 (Supp. V 1981).

government, reflecting the circumstances of the particular regulatory regime, the temper of presidential/congressional relations at the time, or the perceived success or failure of an existing agency performing like functions, more than any grand scheme of government.³⁸

The diversity of form, however, ought not to conceal the substantial commonalities of internal structure, function, and procedure. Despite the attention often given asserted differences between single, politically responsible administrators and multimember independent commissions,³⁹ these organizations are more similar than different below the highest levels. In its regulatory work each is subdivided in accordance with the same principles of bureaucratic organization, relies upon staff protected by the same civil service laws,⁴⁰ performs the same functions, employs the same public procedures, and settles disputes using the same types of decisional personnel.

Imagine, for example, a single corporation operating a coal mine, a manufacturing plant, and a nuclear power station. The safety of its workplaces would be regulated by the three agencies noted above—the Department of Labor, OSHA/OSHC (also within the Department), and the NRC. From its perspective, the placement of these regulatory agencies in the structure of government is essentially irrelevant. Each “legislates” in adopting the rules the corporation is compelled to obey; each engages in executive activity in conducting investigations, adopting policies within the “legislative” framework, or deciding to initiate formal proceedings; each “adjudicates” the ensuing complaints. The Administrative Procedure Act applies equally to all agency types. Case law involving agency procedure, judicial review, or presidential and congressional oversight gives no hint that an agency’s “independence” *vel non* could be a significant factor in any decision about appropriate or fair procedures.⁴¹

38. R. Cushman, *The Independent Regulatory Commissions* (1941).

39. E.g., *The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* 13–18 (1971); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *Yale L.J.* 931, 935–37, 961–62 (1960); Minow, *Suggestions for Improvement of the Administrative Process*, 15 *Ad. L. Rev.* 146, 147–48 (1963).

40. 5 U.S.C. §§ 1103–1104, 2101–2105 (1982).

41. These generalizations, like almost all generalizations about administrative law, are overstated in some details; the relationship between OSHA and OSHRC, for example, has no counterpart in the NRC. Having a separate, “independent” appellate tribunal within an executive department, however, is neither the predominating pattern nor perceived as a requisite. Cf. R. Cass, *Agency Rev. of Admin. Law Judges' Decisions: A Report to the Admin. Conference of U.S.* 220 (1983) (independent review boards appropriate only for special class of decisions); *Admin. Conference of U.S., Recommendations*, 1 C.F.R. § 305–68.6 (1983) (delegation of final decisional authority subject to discretionary review by agency); Freedman, *Review Boards in the Administrative Process*, 117 *U. Pa. L. Rev.* 546, 572 (1969) (“legislation compelling all agencies to create Review Boards would be unwise”). The *Recommendation of the Administrative Conference, Agency Structures for Review of Decisions of Presiding Officers Under the APA*, 1 C.F.R. § 305.83–3 (1983), makes no mention of review board independence.

Beyond the identity of public procedures and the frequently mixed character of agency function lies the essential similarity of the human resources of all agencies. All are predominantly staffed by civil servants protected from political reprisal in the performance of their jobs. In consequence, even agency work outside the public procedures of the APA is substantially independent of political influence, whatever the apparent place of the agency in the governmental structure. As Presidents and political scientists are fond of remarking,⁴² the White House does not control policymaking in the executive departments. The President and a few hundred political appointees are at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and often have strong views of the public good in the field in which they work.⁴³ The ability to contribute to what he regards as beneficial change is often what has motivated the bureaucrat to choose public employment. Presidents come and go while the governing statutes, the bureaucrat's values, and the interactions he enjoys with fellow workers, remain more or less constant. To be sure, he can be influenced by outside pressures; obedience to authority, avoidance of the pain of antagonistic committee hearings or budget reductions, and a general desire for the good will of the political leadership are undoubted factors in his behavior.⁴⁴ Winning budget support in Congress, or office space, or effective representation in judicial proceedings, are not trivial goods—even absent the political loyalties that may derive from appointment or the sharing of general aspirations about government policy. Nonetheless the bureaucracy constitutes an independent force—indeed, that fact is in some respects the dominating problem of the current administrative law literature⁴⁵—and its cooperation must be won to achieve any desired outcome.⁴⁶

42. President Truman is reported to have described his authority as the power "to bring people in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the powers of the President amount to." C. Rossiter, *The American Presidency* 149 (2d rev. ed. 1960); see also E. Griffith, *The American Presidency, The Dilemmas of Shared Power and Divided Government* 43-51 (1976); H. Hecl, *A Government of Strangers: Executive Politics In Washington* (1977); D. James, *The Contemporary Presidency* 122-29 (1969); G. McConnell, *The Modern Presidency* 61-79 (1976); R. Neustadt, *Presidential Power—The Politics of Leadership From FDR to Carter* ch. 3 (1980).

43. For remarkable and sensitive accounts of the internal strengths and functioning of the American national bureaucracy, see the works of H. Kaufman, e.g., *The Forest Ranger* (1960) and *The Administrative Behavior of Federal Bureau Chiefs* (1981); see also H. Merry, *supra* note 26.

44. See *infra* text accompanying notes 70-74; cf. Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, *Am. Econ. Rev.* (forthcoming June 1984) (offering an economic explanation of altruism).

45. See, e.g., H. Merry, *supra* note 26, at 59-60; Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1676-88 (1975).

46. Experience under the present administration suggests this to be less clearly so when the issue is not which regulation shall be adopted, but whether regulation shall occur at all. Dismantling is perhaps one activity that—if generally tolerated—can be managed from the top.

B. *Presidential Direction of Agencies*

Viewed from any perspective other than independence in policy formation, the legal regime within which agencies function is highly unified under presidential direction. Many administrative functions are centrally performed, a product of congressional recognition that all agencies share many of the administrative needs of government, for which central management under presidential supervision is highly desirable.⁴⁷ Thus, the property of independent as well as executive-branch agencies is managed by the General Services Administration, and their contracts are entered in accordance with its procurement regulations.⁴⁸ The Department of Justice, to varying degrees, represents their interests in court;⁴⁹ the Office of Personnel Management and the Merit Systems Protection Board regulate their employment practices, pay scales and allocation of super-grade management posts.⁵⁰ The protection of national secrets, with one statutory exception,⁵¹ occurs under an executive order,⁵² which establishes both the regime for classification and the requirements for access; and the executive branch performs the investigations that qualify persons for clearance.⁵³ Government contracts contain nondiscrimination clauses, and an enforcement regime housed in an executive department has been established, again on the basis of an executive order.⁵⁴

47. Bruff, *Presidential Power and Administrative Rulemaking*, 88 *Yale L.J.* 451, 491-95 (1979).

48. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (codified as amended at 40 U.S.C. §§ 471-544 (1976 & Supp. V 1981)).

49. 28 U.S.C. § 516 (1982).

50. 5 U.S.C. § 1103 (1982) (Office of Personnel Management); 5 U.S.C. §§ 1205-1206 (1982) (Merit Systems Protection Board and Special Counsel); see also Reorganization Plan No. 2 of 1978, 3 C.F.R. 323, 323-27 (1978), reprinted in 5 U.S.C. § 1101 app. at 452-54 (1982), and in 92 Stat. 3783, 3783-85 (Office of Personnel Management and Merit Systems Protection Board powers); Implementation of Reform of Personnel Management System, Exec. Order No. 12,107, 3 C.F.R. 264 (1978), reprinted in 5 U.S.C. § 1101 app. at 456-60 (1982).

51. Atomic Energy Act of 1954, ch. 1073, §§ 141-146, 68 Stat. 919, 940-43 (codified as amended at 42 U.S.C. §§ 2161-2166 (1976 & Supp. V 1981)).

52. Exec. Order No. 12,065, 3 C.F.R. 190 (1978), as amended by Exec. Order No. 12,148, 3 C.F.R. 412, 418 (1979), and Exec. Order No. 12,163, 3 C.F.R. 435, 443 (1979).

53. There is no obvious statutory authority for either the government's loyalty-security program of the 1950's or its requirement that antidiscrimination clauses be inserted in government contracts. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-12 (1979); *Greene v. McElroy*, 360 U.S. 474, 502-08 (1959).

54. See Exec. Order No. 11,246, §§ 201-212, 3 C.F.R. 567 (1966), as amended Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.); Exec. Order No. 12,086, 3 C.F.R. 230 (1978); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

The examples in the text are far from exhaustive. Thus, the Federal Advisory Committee Act requires consultation with the OMB, following criteria intended to promote representativeness and reduce the numbers of advisory committees, before any advisory committee may be created. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. § 1 (1982)). The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976), gives the Council on Environmental Quality a coordinative role in the review and appraisal of

Even in the arena of policy, one readily finds major respects in which agencies' work is centrally managed.⁵⁵ The National Security Council coordinates interagency studies to develop national policy at the request of the President or a possibly affected agency, without necessary regard to the independence (or lack of it) of the agencies that may be affected.⁵⁶ Similarly, the Office of Management and Budget coordinates agency comments on some proposed rules, promoting conferences and other collaborative efforts in order to produce a result maximally acceptable among all agencies concerned.⁵⁷ OMB plays a coordinating role also when agencies find themselves in the jurisdictional disputes that are the inevitable consequence of the enormous number of regulatory measures Congress enacts and the many different agencies to which it assigns responsibility.⁵⁸ Although litigation or the seeking of a formal legal opinion from the Attorney General would be possible, for example, in the face of uncertainty whether the Nuclear Regulatory Commission or the Environmental Protection Agency had primary regulatory responsibility for radioactive discharges from NRC regulated plants into EPA regulated waters,⁵⁹ the more usual course is to put the matter before OMB, which will attempt more informally to bring the agencies to an understanding.

Other White House operations involve all agencies in the formulation or implementation of overarching national policy. Most prominent may be the OMB's annual creation of a national budget expressing the President's view of the relative priorities to be accorded the various efforts of national government. While Congress has occasionally limited the discipline of the budget process by requiring agencies simultaneously to provide the appropriate congressional committees their submissions to OMB,⁶⁰ the President's coordina-

environmental impact statements throughout government. The President by executive order has authorized it to adopt rules prescribing the form those analyses must take. Exec. Order No. 11,991, 3 C.F.R. 123 (1977).

55. The policy bases for central direction are well set out in A.B.A. Comm'n on Law and the Economy, *Federal Regulation: Roads to Reform* 68-91 (1979) [hereinafter cited as *Roads to Reform*]. See also Bruff, *supra* note 47, at 474-75. However, Congress has occasionally made judgments precluding balancing, which the President as much as the agency concerned would be obliged to respect. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943, 950 n.41 (1980).

56. 50 U.S.C. § 402 (1976).

57. See, e.g., Bruff, *supra* note 47, at 464-65 (discussing the "Quality of Life" review instituted by the OMB in 1971 to review environmental regulations). Although (given the political sensitivities on Capitol Hill) independent agencies' participation has been highly variable and unforced, OMB's "honest broker" function is an important one, as often useful to agencies as it is threatening. R. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission And Antitrust Policy* 140 (1980).

58. *Roads to Reform*, *supra* note 55, at 70-72, lists "sixteen federal regulatory agencies, within and outside the executive branch, each created and governed by its own separate statutes, with responsibilities that directly affect the price and supply of energy."

59. *Cf. Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976).

60. The Interstate Commerce Commission, the Commodity Futures Trading Commission, and the Consumer Product Safety Commission are freed by statute from submitting to plenary

tive, policy-setting function is recognized in these provisions also. Overall, presidential coordination is an activity of importance, one in which the agencies generally cooperate and from which they receive benefit as well as occasional constraint.⁶¹

The independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive-branch agencies. The President's influence reaches somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission. Where subsidiary officers in the executive agencies may be subject to presidential appointment and certainly require White House clearance, in the independent agencies only commissioners are appointed with required executive participation; staff appointments, even at the highest level, are made by the commission. The requirement that commission membership be at least nominally bipartisan does not prevent the appointment of political friends but doubtless lowers the political temperature. Typically, the independents have more authority to conduct their own litigation than executive-branch agencies do, although not exclusive authority. Executive-branch agen-

oversight. See 31 U.S.C. § 1105 (1982), 7 U.S.C. § 4a(h) (1982), and 15 U.S.C. § 2076(k)(2) (1982) respectively. While current proposals of regulatory reform consider whether to exempt all independent regulatory commissions from OMB budgetary and legislative discipline, earlier congressional reaction to agency independence from budgetary discipline was quite the opposite. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (reorganized by P.L. No. 97-258, § 1, 96 Stat. 877 (1982), codified as reorganized in scattered sections of 31 U.S.C.), which established a Bureau of the Budget within the Treasury Department, directed every department and establishment to furnish budget information to the Bureau, and that was taken to include the independents. *Id.* § 207, 42 Stat. 22. The only exceptions were for "the Legislative Branch of the government and the Supreme Court" which were to transmit their estimates to the President for inclusion in the budget without revision. *Id.* §§ 201(a), 213, 42 Stat. 20, 23. In 1939 the act was amended specifically to include "any independent regulatory commission or board" among the agencies subject to the budget act. Reorganization Act of 1939, ch. 36, 53 Stat. 561, 565 (codified at 31 U.S.C. §§ 701, 1101 (1982)). Representative Warren, a member of the Select Committee on Governmental Organization, explained this measure to the House in the following words: "With respect to title II of the bill, under the decision in the Humphrey case, we had something new to appear down here in respect of some of these agencies. They shrugged their shoulders and said 'We are not under any budgetary control,' quoting that case . . . Now, all that title II does is to bring every single, solitary one of them under Budget control, and I believe everybody in this House favors that." 84 Cong. Rec. 2315 (1939); see also 84 Cong. Rec. 2306 (1939) (statement of Rep. Cochran).

61. See, e.g., R. Katzman, *supra* note 57, at 140:

[M]anagement specialists in the Commission regard the OMB as a useful ally in instituting organizational changes that are designed to centralize control and are opposed by the bureau heads. Commented one commission staff member who worked closely with the executive director: "We know the bureau heads do not like procedures which enable the chairman and the other commissioners to get a better idea about what the troops are doing. So, we tell them it's just not a question of what the chairman and the other commissioners want. The Office of Management and Budget, which could make trouble for us, will react unsympathetically to requests for more attorneys if we don't accommodate them by tightening up our management systems."

cies have an obligation to clear legislative matters—draft statutes, budget submission, even testimony—with the Office of Management and Budget, an obligation from which some of the independents are excused.⁶² One recent statute, the Paperwork Reduction Act of 1980,⁶³ specifically empowers the independents to overrule by majority the Presidential directives respecting the collection of information to which executive branch agencies are bound.⁶⁴ As a political matter, recent Presidents have not required the independent commissions to participate in the centralized oversight of rulemaking associated with presidentially required cost-benefit analyses of major proposals for rule-making.

Yet these differences are at best matters of degree, overstated if taken to imply rigorous control within the executive branch. Even in executive agencies, the layer over which the President enjoys direct control of personnel is very thin and political factors may make it difficult for him to exercise even those controls to the fullest. An administrator with a public constituency and mandate, such as William Ruckelshaus,⁶⁵ cannot be discharged—and understands that he cannot be discharged—without substantial political cost. Also for political reasons, one may be certain that independent commission consultation with the White House about appointments often occurs, even if subdued—as in so many other matters—by the lack of obligation so to consult.

Presidential influence over the independent agencies is heightened by the special ties existing between the President and the chairmen of almost all of the independent regulatory commissions. Although all commissioners, including the chairmen, are appointed to fixed terms as commissioners, the chairman generally holds that special post at the President's pleasure.⁶⁶ His posi-

62. Commodity Futures Trading Commission, 7 U.S.C. § 4a(h) (1982) (budget estimates, testimony, and legislative recommendations); Consumer Product Safety Commission, 15 U.S.C. § 2076(k) (1982) (same); Federal Election Commission, 2 U.S.C. § 437d(d) (1982) (same); Interstate Commerce Commission, 31 U.S.C. § 1105 (1982) (budget estimates). Compare the budgetary discipline to which agencies must otherwise conform. See *supra* note 60.

63. Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 5 U.S.C. § 5315 (1982), 20 U.S.C. § 1221, 30 U.S.C. §§ 1211-1213 (1982), 42 U.S.C. § 292h (Supp. V 1981), 44 U.S.C. §§ 2904(10), 2905, 3501-3520 (Supp. V 1981)).

64. 44 U.S.C. § 3507(c) (Supp. V 1981). By requiring initial clearance from OMB and a public, reasoned act to overrule its guidance, even that provision suggests congressional respect for the President's central, coordinative function.

65. Mr. Ruckelshaus first served as administrator of the Environmental Protection Agency during the Nixon and Ford Administrations and was called to serve again during the Reagan Administration. He acquired a strong reputation for energetic and independent administration during his first term. See J. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* (1976). This reputation underlay the choice of him to replace Anne Gorsuch Burford, President Reagan's first administrator for the agency, after her resignation in the midst of strong criticism of her stewardship. See *infra* note 351.

66. See D. Welborn, *Governance of Federal Regulatory Agencies* 6-7, 37, 141 (1977); W. Cary, *Politics And The Regulatory Agencies* 5-24 (1967). The chairmen of the Federal Reserve Board and the Consumer Product Safety Commission enjoy statutory protection of tenure. 12 U.S.C. § 241 (1982) (Federal Reserve Board); 15 U.S.C. § 2053 (1982) (Consumer Product Safety

tion, moreover, gives him special influence over the agency's course, making it particularly likely that his views will find acceptance. Professor David Welborn's interesting and thorough study of regulatory commission chairmen reveals that they almost completely dominate the administrative side of commission business, selecting most staff, setting budgetary policy, and as a consequence commanding staff loyalties.⁶⁷ These administrative responsibilities, corresponding to presidential responsibilities for the government as a whole, doubtless underlie Congress's general recognition of the President's special claim to have his own choice as chairman.⁶⁸ Perhaps more surprisingly, the chairmen also dominate commission policymaking: commanding the staff, they are far less often in dissent from commission policy decisions than their colleagues. Here the White House connection is often less direct and generally more subtle,⁶⁹ but consultation and coordination on general policy issues of national interest naturally occurs.⁷⁰

C. Agency Relations with Congress and the Courts

Within the domain of agencies we are discussing,⁷¹ the existence of statutory limits and the potential enforcement of those limits in the courts imply oversight relationships in addition to those that agencies may have with the White House or the Secretary. In any matter of importance, the public, the press, the intended subjects of the policy, the courts, and interested congressmen and their staffs also become involved. And one may search both the law and the literature on congressional-bureaucratic relationships⁷² or the operation of judicial review⁷³ in vain for an indication that the relationships between these overseers and the agencies varies in any regular way in accordance with agency structure. The rules of judicial review distinguish between

Commission). The Federal Reserve Board, at least, operates in a setting in which public confidence has long been thought paramount, and Congress seeks no oversight of its own. See also Bruff, *supra* note 47, at 496, 499; Roads to Reform, *supra* note 55, at 85.

67. See generally D. Welborn, *supra* note 66.

68. It is not surprising to find, then, that most major internal reorganizations of regulatory agencies, undertaken at the chairmen's initiative, have coincided with the election of a new President. The personal, political loyalty of the chairman assures the President a substantial impact on agency administration, and consequent influence on policy.

69. Occasional political firestorms—such as the reaction to President Reagan's reported conversations with the FCC chairman concerning formulation of FCC television syndication rules—serve as reminders of the values the public and Congress attach to independence in substantive agency decisionmaking. See N.Y. Times, Nov. 4, 1983, at C26, col. 1.

70. See W. Cary, *supra* note 66, at 23–26.

71. See *supra* note 11.

72. E.g., R. Arnold, *Congress and the Bureaucracy: A Theory of Influence* (1979); W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 103–26; W. Niskanen, *Bureaucracy and Representative Government* 138–68 (1971); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 *Am. Econ. Rev. (Papers and Proceedings)* 256–60 (1978); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765 (1983).

73. See, especially, R.S. Melnick, *Regulation and the Courts* (1983).

those proceedings held "on the record" and those that are not, but express no differences for such proceedings held in one type of agency or another. So also for congressional oversight relationships: budgetary controls, investigations, hearings, and all the general apparatus of congressional oversight are brought to bear across the board. As has often enough been noted, these relationships can be particularly important; congressmen and committee staffs tend to be longer-lived than Presidents and their appointees, and through hearings and budgetary actions can work much mischief.⁷⁴

There are, to be sure, differences of tone. The uncertainty about what "independence" means shapes the behavior of the Congress, the President and the agencies alike. Congressmen tend to talk about the independent commissions in a proprietary way—these are "our" agencies, not so much independent as independent-of-the-President. One result of this attitude—hard to measure but suggested by local belief—may be a greater intensity of congressional political oversight of the independents. Even if congressional oversight is not itself measurably more intense, it may be the more effective if not answered by counterpressures; as a former FTC Chairman recently remarked, the independent agencies "have no lifeline to the White House. [They] are naked before Congress, without protection there," because of the President's choice not to risk the political cost that assertion of his interest would entail.⁷⁵ In any event, Congress's techniques do not vary; no particular form of dominion is asserted over "independent" agencies that is not practiced also on the agencies associated more directly with the White House. And, as already indicated, Congress generally provides for a large measure of presidential participation in the day-to-day administration, if not the policy formation, of those agencies.

D. The Character of Presidential and Congressional Oversight Relations with Agencies is Determined as Much by Politics as by Law

Perhaps the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law. The White House's treatment of cost-benefit analysis by independent regulatory commissions in conjunction with major rulemakings is a notable example. Both President Carter and President Reagan were advised (correctly, in my view) that they had authority to include the independents in their executive orders promoting economic analysis of proposed rules as an element of regulatory reform.⁷⁶ Neither did include those

74. See generally E. Corwin, *The President: Office And Powers 1787-1957*, at 184-85, 266-67, 291-95 (4th rev. ed. 1957); H. Hecla, *supra* note 42.

75. Remarks of Calvin Collier, Assembly of the Administrative Conference of the United States, Washington D.C. (Dec. 15, 1983). Chairman Collier noted only three respects in which independent and executive agencies differ: the set term of office, the statutory efforts to attain bipartisan membership on the Commissions, and the practical difference noted in the text.

76. See Executive Orders Nos. 12,044, 3 C.F.R. 152 (1979) (Carter), and 12,291, 46 Fed. Reg. 13193 (1981), reprinted in 5 U.S.C.A. 601 (West Supp. 1983) (Reagan). President Carter was

agencies, reasoning that the political costs of arousing congressional opposition, perhaps to the order as a whole, would be too great.⁷⁷ In fact, the independents generally have complied with these executive orders: they have participated in the Regulatory Council, publish regular agendas of rulemaking, are attentive to White House inquiries about their progress, and otherwise behave as if they were in fact subject to the discipline from which they have been excused.⁷⁸

The reasons for this acceptance of presidential input are clear. The President's effective power over the independents would counsel against excluding his concerns even if political loyalties did not command attention.⁷⁹ If

advised by the Department of Justice on the power to bind the independent regulatory agencies to the requirements of Exec. Order No. 12,033, see 43 Fed. Reg. 12,670 (1978), and wrote to the heads of the independent regulatory agencies urging them to follow Exec. Order No. 12,044. A copy of the letter is at 14 Weekly Comp. Pres. Doc. 563 (1978). See also Congressional Research Service, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order No. 12,291* (Comm. Print 1981); Hearings On S. 344 and S. 1080 Before the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 319-440 (1981); U.S. Dep't of Justice, *Memorandum re Proposed Executive Order on Federal Regulation 7-13* (Feb. 12, 1981) (addressing the question of the legality of applying proposed Executive Order No. 12,291 to the independent regulatory agencies), reprinted in *Role of The Office of Management and Budget in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158-64* (1981) [hereinafter cited as *Hearings*].

77. Most of the activities the executive orders sought to reach occurred within the executive branch; even though the rationale for the orders plainly reached the independents' activities, the White House could afford to give up on compliance at the fringes of its concerns in order to avoid a political ruckus—particularly if voluntary compliance could be expected. See remarks of C. Boyden Gray, Counsel to Vice President Bush and the Presidential Task Force on Regulatory Relief, quoted in *Hearings*, supra note 76, at 94 (reprinting a transcript of the Hall of Flags Regulatory Reform Briefing Before the United States Chamber of Commerce).

78. As reported in *The First 100 Days of E. O. 12291*, a report to the Presidential Task Force prepared by OMB, and released June 13, 1981, reproduced in *Hearings*, supra note 76, at 308-27:

Independent Agency Actions: On March 25 Vice President Bush sent a letter to the "independent" regulatory agencies asking them to comply voluntarily with Sections 2 and 3 of the Executive Order and to comply with its overall spirit "to demonstrate to the American people the willingness of all components of the Federal Government to respond to their concerns about the unnecessary intrusion of government into their daily lives." Seven agencies have responded to the Vice President's request so far (Civil Aeronautics Board, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Home Loan Bank Board, Federal Mine Safety and Health Review Commission, Interstate Commerce Commission, and the Securities and Exchange Commission). All of these agencies indicated their willingness to abide by the spirit and principles of the Executive Order.

Id. at 315.

A copy of Vice President Bush's letter to the independents and the agency responses is found in *Hearings*, supra note 76, at 177-94. See also *Implementation of the Paperwork Reduction Act of 1980: Hearings Before the Subcomm. on Federal Expenditures, Research, and Rules of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 41-42* (1982) (list of agencies required by OMB to estimate number of hours required of public to comply with federal government requests for information).

79. A typical instance involved an appeal to Theodore Sorenson of the Kennedy administration to expedite consideration of the Federal Power Commission's budget. At the time the

the President's policies make good sense, or the importance or utility of coordination or a single policy is evident, the independents can be expected to comply. Its members are likely to understand that the view they bring to policy issues is intentionally specialized and shaped by the particular matters put into their charge, and that the President is in a position to learn and appreciate the views of other responsible agencies, and to supply a useful broader perspective.⁸⁰

Another important consideration lies in the commissions' need for presidential good will. Congressional oversight can be just as political as presidential oversight and, with 535 members of Congress, much more complicated.⁸¹ It can be useful to be associated with national policy, to have a big and politically powerful "friend," when appearing before Congress. The commissions need goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy. They share a commitment to achieving the public interest, and are likely to respect the President's motives and appreciate his political responsibility and support. They are flattered when their own advice is sought, and respectful of office when they are advised. In the circumstances, it is not surprising that the independent commissions can be susceptible to substantial presidential oversight.

On the other hand, for the executive agencies as well as for the independent commissions, the extent of presidential authority to command particular outcomes is uncertain, and the political context constrains as well as empowers presidential intervention. Congressional relationships not only serve as a source of unwanted pressure, but also can be used fruitfully to resist presidential pressures to do what the bureaucrat regards as wrong. The press

Commission was engaged in a dispute with the Department of the Interior, the Commission's position being in opposition to the administration's. Sorenson made it known that his attention would return to the FPC's budget at about the time it resolved its dispute with the Interior Department.

80. See *supra* text accompanying notes 55-59. It is also the case that many general skills required by agencies are more efficiently exercised by a central authority. Consider, for example, the frequent provision for self-representation by the independent agencies on judicial review of their decisions. See, e.g., 12 U.S.C. § 1828(c)(7)(D) (1982) (comptroller of currency, Federal Reserve Board and Federal Deposit Insurance Corporations); 15 U.S.C. § 56(a)(2) (1982) (Federal Trade Commission); 28 U.S.C. § 2323 (1976) (Interstate Commerce Commission authorized to represent itself as a party); *id.* § 2348 (1976) (same authority granted to Federal Communications Commission, Federal Maritime Commission, and the Nuclear Regulatory Commission). Such provisions are responsive to the concern that the President's Department of Justice might not be sufficiently understanding of their positions. Yet what self-representation in court gains for the agencies in ability to defend their particular policies, it loses in capacity to deal with the common issues that characterize much judicial review of agency action: compliance with general statutes, such as the Administrative Procedure Act or the Freedom of Information Act, 5 U.S.C. § 552 (1982), standing, ripeness, and other like issues of reviewability, general standards of review, and, at an operational level, reputation and litigating competence in the judicial forum.

81. See Weingast & Moran, *The Myth of the Runaway Bureaucracy: The Case of the FTC, Regulation*, May/June 1982, at 33.

and others can also be brought into play. Finally, the governing statute, with the limited set of factors it may identify as relevant to any given policy decision and the assignment of primary decisional responsibility it makes, also serves to constrain the President's influence.

The limited documentation of the process by which OMB and other executive offices participate in rulemaking accounts for the informal nature of the conclusions of this Part as well as public fears of improper pressure. Much takes place over the telephone or in informal meetings, from which documentation is unlikely. OMB naturally fears that exposure, particularly to Congress, is likely to diminish its influence. The production of written documents takes precious time and resources from other tasks. And, much as our society values openness, it remains true that candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.⁸² Yet one should not rush from acknowledging the paucity of information to the judgment that Congress's assignments of responsibility have been undone, that the President enjoys an iron control over the work of law-administration. Both because statutes place decisional authority in the agencies, not the President, and because the White House often lacks the personnel and knowledge to make detailed judgments about policy content, actual as well as legal placement of final decisions generally remains with the agencies.⁸³

82. Consider the following exchange between Representative John D. Dingell (D-Mich.), Chairman of the House Committee on Energy and Commerce and of the Subcommittee on Oversight and Investigations, and James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget, and Executive Director, Presidential Task Force on Regulatory Relief, after Dingell requested copies of the fifty-five rules returned by OMB to an agency for review:

D: I will not ask for the originals. I will just ask for copies, and the Chair will advise I will be quite content to receive those. . . .

M: We do not have an original.

D: Well, who has the original?

M: Sir, the flow of paper into our office is awesome. Under the Paperwork Reduction Act, the irony is that the paperflow in our office has increased from something like 3,000 transactions to 12,000 transactions, and so we do not even . . .

D: I am impressed but all I am asking for is copies of papers that are supposed to be in your files.

M: I do not know how you allege that, sir, not knowing what our filing system is. I have just said that we do not keep copies of the regulations.

Hearings, *supra* note 76, at 112.

83. The recent controversies between OSHA and OMB over alteration of that agency's cotton dust and lead rules suggest the agency's effective initiative and authority. See *Lead Exposure Limits To Be Retained*, *Legal Times*, May 30, 1983, at 1 col. 1. To the same effect, see the Environmental Protection Agency's lead standards, 40 C.F.R. §§ 60.120-.123, 60.180-.186 (1983) (lead smelters); 40 C.F.R. § 50.12 (1983) (ambient air quality standards for lead). For accounts of presidential interventions at EPA in prior administrations, see B. Ackerman & W. Hassler, *Clean Coal/Dirty Air* 86-103 (1981); J. Quarles, *supra* note 65 at 117-42; Pedersen, *Formal Records and Informal Rulemaking*, 85 *Yale L.J.* 38, 51-59 (1975).

In sum, any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced. Our government is characterized by a profusion of forms, each related in significant ways to Congress, President and Court. The choice of form has little relation to the work they do or the manner in which they perform it.

II. THE LIMITED CONSTITUTIONAL INSTRUCTIONS ABOUT THE PLACE OF AGENCIES IN GOVERNMENT

Just as the realities of the administrative state constrain any effort to describe it in purely legal and theoretical terms, so for a lawyer do the existing bodies of textual and decisional prescription of the Constitution. Although the latter resources are open to reinterpretation and fresh understanding—in the very light, for example, of the contemporary facts of government—the flexibility to reshape language or find error in past conception is no license to disregard them. An overall sense of continuity, of being anchored in the text and its interpretations, is central to our sense of the Constitution's place. This Part of the essay examines those legal resources—constitutional text, context, and interpretation—to see what constraints they may impose on Congress's undoubtedly large authority to structure the inferior parts of the federal government.

From this examination will emerge three general propositions about the three theoretical approaches to understanding the place of agencies in government identified in the introduction.⁸⁴ The first is that, as a textual and interpretational matter, the separation-of-powers model need and probably should be taken no further than its use for understanding the interrelationships of the three named actors (Congress, President, Court) at the very pinnacle of government. Subject to definitional issues, we accept (and the Constitution is reasonably explicit) that, as among them, only Congress may legislate, only the Supreme Court may adjudicate, and only the President may see to the faithful execution of the laws; and each is to have a significant function in these respects. In this way, "separation of powers" remains vital in suggesting the forms of control each of the three may exercise over the bulk of government. Yet in the agencies, as we have seen, powers are not in fact separated and the agencies are not responsible to only one of these actors. Although agencies certainly might be assigned to one or another of the executive, legislative, or judicial branches (but not more than one, if we are rigorously to pursue the separation idea), that signifies little for the functions they perform. No compelling textual or interpretive mandate requires such a formal placement to be effected.

A second proposition emerging from the cases is that considerations of individual fairness more closely associated with the idea of separation of

84. See *supra* text following note 14.

functions often underlie the cases in which the idea of separation of powers appears to have played a significant role. The impulses for both congressional and judicial action may arise from individuals' needs for protection from political intervention in particular cases more than any general theory about place in government; the former can be provided without necessary regard for the latter.

Finally and perhaps most importantly, the text and particularly the context suggest a series of postulates about necessary relationships between the President and administrative agencies—relationships readily understood in checks-and-balances terms. The important constraint on Congress's ability to structure the work of law-administration lies in the need to perpetuate the tensions and interactions among the three named heads of the Constitution. Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress. The central inquiry is to identify those relationships that are necessary, either to conform with the constitutional text or to preserve the possibility of the President's continuing effectiveness. Since this inquiry remains entirely sensible in the face of the realities of contemporary government—and indeed the political counterweight idea has lost none of its compulsion for us—the checks-and-balances approach remains a useful tool for analyzing and suggesting possible limits on Congress's ability to structure the administrative process.

A. *The Text and Context of the Constitution*

The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government. One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some aspects of the legislative process, it says little about how those it names as necessary elements of government—Congress, President, and Supreme Court—will perform their functions, and it says almost nothing at all about the unelected officials who, even in 1789, would necessarily perform the bulk of the government's work. Thus, article I describes in some detail the makeup of the House and Senate, the subjects on which they might act, and the manner in which they may effectively legislate; but even this relatively full description talks only to the authority and actions of elected officials. One finds no mention there of important aspects of Congress's work, or of most persons who now work on its behalf—committees and their staffs, the General Accounting Office, the Congressional Budget Office, the Library of Congress.⁸⁵

85. To be sure, the committee system became particularly important with the emergence of the political party, and the explosive growth in staff has occurred in recent years. Nonetheless, it seems fair to describe article I as assuming much of what a legislature does, and providing only for what seemed likely to prove controversial or dangerous to citizens or the states.

For articles II and III, the limitations of description are even more striking.⁸⁶ Article II speaks directly only about elected officials, chiefly the President and his powers; it describes those powers in the most summary of terms. He is vested generally with “the executive Power,”⁸⁷ but what that is in the domestic context does not readily appear.⁸⁸ Putting aside foreign relations and military authority—a very large part of the Presidency, but not the focus of this essay⁸⁹—he has the following powers and/or responsibilities:

to appoint those “Officers of the United States . . . which shall be established by Law,” subject to the requirement of senatorial confirmation and to the possibility that Congress might effectively limit this power to appointing “the Heads of Departments”;⁹⁰

to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”;⁹¹

“from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration” proposed legislation;⁹²

to “take Care that the Laws be faithfully executed.”⁹³

These provisions suggest a supervisory, perhaps even caretaker presidential role, in relationship to shadowy “executive departments” from which opinions might be sought. One is left to infer that there would be other officers possessing legal authority to act for the government, and one simply is not told whether the President or those officers are to act on those opinions.

Article III is more direct, denying any need for inferior federal courts unless and to the extent Congress chose to create them. Only the Supreme Court is a required element of the federal judiciary, and even for that institution central issues are left unspoken—its number, its term, its authority over the work of the other named actors. In almost all significant respects, then, the job of creating and altering the shape of the federal government was left to

86. The ordering reflects the anticipated ordering in importance of the powers thus separated and the bodies exercising them. See *The Federalist* No. 51 (J. Madison) (Congress inevitably the most powerful); *The Federalist* No. 78 (A. Hamilton) (judiciary as “least dangerous” branch); G. Wills, *supra* note 19, at 128–29.

87. U.S. Const. art. II, § 1, cl. 1.

88. Both the legislative and the judicial powers are enumerated in the Constitution, the former by a reference to “Powers herein granted,” U.S. Const. Art. I, § 1, the latter by a statement what it “shall extend to.” U.S. Const. Art. III, § 2. “[W]hether intentional or not, [the absence of any similar language from the vesting clause of article II] admitted an interpretation of executive power which would give to the president a field of action much wider than that outlined by the enumerated powers.” C. Thach, *The Creation of the Presidency 1775–1789*, at 138–39 (1923).

89. See *supra* note 11.

90. U.S. Const. art. II, § 2, cl. 2.

91. U.S. Const. art. II, § 2, cl. 1.

92. U.S. Const. art. II, § 3.

93. *Id.*

the future—to the congressional processes suggested by Congress's authority to adopt any law "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁹⁴

If one moves outward from the text to its structure, the context in which it was drafted, the records and debates of the constitutional convention, and its initial implementation by the first Congress, one can identify a number of fundamental underlying judgments.⁹⁵ The text's omission to provide for the "Departments" it occasionally refers to⁹⁶ reflects a parliamentary history in which quite detailed proposals for cabinet structure were put forward. Some decisions respecting the allocation and sharing of power within such a structure were clearly taken, but then a determination was made to eschew detailed prescription as a means of underscoring presidential responsibility and preserving congressional flexibility within the constraints of the judgments that had been made.

1. *The President is to be a Unitary, Politically Accountable Head of Government.* — Of the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President. The question was early debated. Roger Sherman, for example, believed that the executive should be subsidiary to the legislature, whose members "[w]ere the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it. . . . [T]he legislature should be at liberty to appoint one or more as experience might dictate."⁹⁷ His views were defeated, however,⁹⁸ as were the views of those who would have provided in the Constitution for the sharing of executive authority with a council of revision or a council of state.⁹⁹ Even if monarchy was rejected for the new nation, that model of executive power was a familiar one. While it was understood that there would be departments responsible for daily administration, the Conven-

94. U.S. Const. art. I, § 8, cl.18.

95. For a brief and well-regarded analysis of the development of article II, see C. Thach, *supra* note 88.

96. Departments are referred to in the necessary and proper clause of article I ("any department") and the opinion in writing ("executive Departments") and appointment ("Heads of Departments") clauses of article II.

97. 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65 (1911).

98. *Id.*; C. Thach, *supra* note 88, at 89–90.

99. All of the proposals for a formal advisory body were defeated, despite the convention's concern that the President receive sound advice. 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 159, 164, 214, 243, 257, 292 (J. Elliot ed. 1866 & Photo. reprint 1941) [hereinafter cited as *Elliot's Debates*]; 1 M. Farrand, *supra* note 97, at 93–102, 138–40; 2 *id.* at 73–80, 298, 367, 537–42. Thach ascribes the rejections to the experience in the states following the Revolution, in which governors encumbered by councils had proved weak and unable to provide either efficient administration or effective resistance to the power of state legislatures; New York, the one state whose governor was not so burdened, had seemed a model of efficient government. C. Thach, *supra* note 88, at 25–54.

tion clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction.¹⁰⁰ “The principle that executive efficiency and executive responsibility varied in inverse proportion to the size of the executive body had been so strongly inculcated and in so many different ways that it was strong enough to force the acceptance of a new principle of executive organization.”¹⁰¹ That choice is one of central importance to the arguments of this essay; however the executive power is defined, it is argued, it must be in ways that respect this quite fundamental structural judgment.

If the Convention was clear in its choice of a single executive—and its associated beliefs that such a person might bear focused political accountability for the work of law-execution and serve as an effective political counterweight to Congress—it was ambivalent in its expectations about the President’s relations with those who would actually do the work of law-administration and desirous of the advantages of congressional flexibility in defining the structure of government within the constraints of this choice. “The beginning of wisdom about the American Presidency is to see that it contains both principles [that is, administrative responsibility subordinate to the legislature and political equality with it] and to reflect on their complex and subtle relation.”¹⁰² Thus, the shadowy references to executive departments and, in particular, the opinions in writing clause,¹⁰³ seem to be residues of propositions such as Gouverneur Morris’s proposal in the final days of the Convention for a council of state composed of the Chief Justice and Secretaries of Domestic Affairs, State, Foreign Affairs, War, Marine, and Commerce and Finance.¹⁰⁴ The Morris proposal would have respected the central political structural judgments that had been made. Under it, each of the identified departments and their Secretaries were to have been granted specific duties—for example, the Secretary of Domestic Affairs was “to attend to matters of general policy, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating communications through the United States; and he shall, from time to time, recommend such measures and establishments as may tend to promote those objects.”¹⁰⁵ Yet each Secretary was distinctly under Presidential control, holding office at the President’s pleasure. As a body, they were to be available to the President for the discussion of any matter he might choose to submit, and he could require from them “written opinions.” Although each was to be “responsible for his

100. The *Federalist* No. 70 (A. Hamilton), the first of the *Federalist* papers addressing the requisites of the presidency, is given over entirely to this choice, as the most important of the choices made, in its tendency to promote decisiveness and responsibility.

101. C. Thach, *supra* note 88, at 89.

102. Storing, Introduction to C. Thach, *supra* note 88, at vii.

103. U.S. Const. art. II, § 2, cl. 1. See *supra* text accompanying note 91.

104. See C. Thach, *supra* note 88, at 119–24; see also *id.* at 100, 138–39 (Morris’s strong influence on article II).

105. 1 Elliot’s Debates, *supra* note 99, at 250.

opinion on the affairs relating to his particular department,"¹⁰⁶ the possibility of ultimate decision was placed elsewhere: the President "shall, in all cases, exercise his own judgment, and either conform to such opinions, or not, as he may think proper."¹⁰⁷

Certainly one consideration underlying rejection of the Morris proposal was the wish to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances. Another consideration was to enhance the accountability—and thus the power—of the President by denying him the chance to hide behind a council's approval of his acts.¹⁰⁸ Indeed, the immediate working out of the constitutional scheme by the first Congress largely paralleled the Morris proposal. Cabinet departments were promptly established, with day-to-day responsibilities for administration, but reporting to the President.¹⁰⁹ Following the Morris model, a practice of cabinet consultation on important issues, nonbinding but respected, quickly arose.¹¹⁰ Presidential control over the cabinet was assured by the provision in this legislation—the decision of 1789, as it came to be regarded,¹¹¹—that the Secretaries were to serve at the President's pleasure, not for a term of years, and thus could be removed by him without cause or senatorial assent.¹¹²

106. 1 *Id.* at 250.

107. *Id.* at 251.

108. C. Thach, *supra* note 88, at 125. It is possible also to view the decision not to adopt the proposal as one largely of style. Note the curious wording of the necessary and proper clause, which speaks only of "powers vested by *this Constitution* . . . in any Department or Officer," not of powers vested by the legislature. It seems that the draftsmen continued to regard the departments as having a constitutional shape and constitutionally vested powers, whether or not made explicit. This lapse may be no more than stylistic, attributable to the heat of the Philadelphia summer and of other, more important controversies among the draftsmen.

109. Act of July 27, 1789, ch. 4, 1 Stat. 28 (Department of Foreign Affairs); Act of August 7, 1789, ch. 7, 1 Stat. 49 (Department of War); Act of September 2, 1789, ch. 12, 1 Stat. 65 (Department of the Treasury); Act of September 22, 1789, ch. 16, 1 Stat. 70 (Postmaster General); Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (Attorney General).

110. See A. McLaughlin, *A Constitutional History Of The United States* 238–47 (1935).

111. See *Myers v. United States*, 272 U.S. 52, 143 (1926).

112. Location of the appointment power in the President, with senatorial advice and consent, had not finally been decided upon for all officers of government until the closing days of the Constitutional Convention; see Hart & Wechsler, *supra* note 2, at 6; 2 M. Farrand, *supra* note 97, at 488–90, 538–40; and Hamilton had assumed in *The Federalist* No. 77 that "the consent of [the Senate] would be necessary to displace as well as to appoint." *Federalist* No. 77, at 459 (C. Rossiter ed. 1961). The question of removal authority was not explicitly discussed at the convention and was treated as open in the legislative debates of 1789; the decision to leave it with the President—carried in the Senate, after secret debate, by the Vice President's vote to break a tie—could well be regarded as one of political wisdom or respect for George Washington rather than a reflection of what the legislators experienced as constitutional compulsion. (The House debates are summarized in *Myers v. United States*, 272 U.S. 52, 111–39 (1926), and may be found in 1 T. Benton, *Abridgement Of The Debates Of Congress*, 85–90, 102–08 (New York 1857).) The failure of the convention to place the removal power explicitly in the President alone led to a constitutional crisis when President Andrew Johnson dismissed Secretary of War Stanton in apparent violation of the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), see A. McLaughlin, *supra* note 110, at 662–75, and the question of senatorial participation in removal that act raised was not

One ought not, however, mistake the drafters' possible ambivalence about presidential role and their willingness to trust the issue of governmental superstructure to future Congresses for a willingness to see the President assigned a role distinctly subordinate to Congress. In providing that Congress need not be convened until December of each year,¹¹³ the draftsmen plainly anticipated a substantial executive function. Congress's articulated functions lay in the passage of legislation to create the framework of government and then to set the standards and appropriate the funds by which the business of government would be carried on. Inevitably that legislation would be episodic—enacted without necessary care for its relationship to existing law and having to be applied to future events, not foreseen, in light of the then existing corpus of law and the exigencies of the moment. Executive authority had to provide correctives for these inherent difficulties, and it was important that the chief executive have a body of individuals, held in his confidence, with whom to consult. The responsibility of government was to be focally his; but day-to-day administration and decision, of necessity, was to be entrusted to the hands of others.

2. *The Maintenance of Tension Among the Named Bodies.* — A central, coordinating and overseeing role for the President in relation to all government "officers" is required, also, to permit that office to serve as an effective check on the otherwise to be feared authority of Congress. The framers sought both to create a more effective national government than they had previously experienced, and to make it resistant to domination by transitory majorities or those who for the moment might be the public's political representatives. To those ends, the governmental structure they created embodies both separated powers and interlocking responsibilities; the purpose was to prevent both majoritarian rashness and the governmental tyranny that could result from the conjoining of power in a single source. Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure for government.¹¹⁴

settled until the decision in *Myers*, sixty years later. See *infra* text accompanying notes 145–47, 163–65.

113. U.S. Const. art. I, § 4, cl. 2.

114. The success of these ambitions is to be measured by the richness and sweep of contemporary government's reach; by the specialization of function that has, overall, occurred; by the extent of political freedom we nonetheless enjoy; and by the continuing tensions among the three named branches over issues of political advantage.

In his recent Storrs Lectures at Yale Law School, my colleague Bruce Ackerman put the point in the following way:

[T]he separation of powers [is] a vast machine by which each constitutional official is encouraged to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the *authentic* accents of the People themselves, rival representatives in other institutions will often find it in their interest to deny that the representative has indeed represented the people in a fully satisfactory way. . . . As it works itself out in practice, the system emphasizes that *no legal form can enable any*

The Constitutional Convention arose out of dissatisfaction with a government dominated by the legislature, a dissatisfaction on both practical and theoretical grounds. In practice, legislative government did not work; legislatures were fragmented and episodic in their attention to the affairs of state, diffusing and defeating responsibility.¹¹⁵ In theory, the joining of all government functions in one authority, unchecked by others, was an invitation to tyranny.¹¹⁶ Interpenetration of function and competition among the branches would protect liberty by preventing the irreversible accretion of ultimate power in any one. As Madison wrote in the *Federalist* papers, the essence lay in "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."¹¹⁷ Madison's strategy was given form in the veto power and in Congress's authority to create the infrastructure of executive government and to exercise plenary control over the President's expenditure of funds (and thus over the size and power of the executive establishment).¹¹⁸

The imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them and in that way serves the same beneficial and protective functions as were anticipated from the creation of checks and balances. In the long interludes between congressio-

small group in Washington, D.C. to speak unequivocally for We the People
 Instead the House and Senate and Presidency each represent the People *in a manner of speaking*; each is [only] a metaphor

Ackerman, *Discovering the Constitution* 1-26 to 1-27 (unpublished speaking manuscript) (emphasis in original).

115. C. Thach, *supra* note 88, at 25-75; *The Federalist* No. 48, at 310-11 (J. Madison) (C. Rossiter ed. 1961) (quoting T. Jefferson).

116. Bruff, *supra* note 47, at 467-68, quoting *The Federalist* No. 48 (J. Madison). See generally Levi, *Some Aspects of Separation of Powers*, 76 *Colum. L. Rev.* 371 (1976); E. Corwin, *supra* note 74, at 3-30; A. Sofaer, *War, Foreign Affairs, And Constitutional Power: The Origins* 1-24 (1976); G. Wood, *Creation of the American Republic, 1776-1787*, at 527 (1969).

117. *The Federalist* No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961). Madison conceded that Congress was better placed for this than the other branches; the choice of a two-part legislature was expected to generate an internal check within that body.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

Id. at 322; see G. Wills, *supra* note 19, at 120.

118.

My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majority, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true

Black, *The Working Balance of the American Political Departments*, 1 *Hastings Const. L.Q.* 13, 15 (1974).

nal sessions, the President would have to make as well as execute national policy; execution cannot be separated from interpretation, nor interpretation from the exercise (within whatever bounds might be statutorily defined) of a policy function. How sharp the definition of bounds had to be (the delegation question as we now know it) or how far removed from the President the function of executing a given law could be placed were open questions. This imprecision invites the desired political rivalries that tend to keep the two more dangerous branches in check. At the same time it permits smoother functioning on issues of agreed importance than would a more rigid structure. With room left for interaction, change and growth over time, the relative strength of President and Congress could change with the political climate, without offending the constitutional structure.

The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity. The British and Confederation experience had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved.¹¹⁹

Thus, while the actual text of the Constitution says little about the structure of the federal government beneath the apex, the structure and history of the Constitution make clear the framers' decisions concerning the interdependence of the three branches and the place of the agencies as subsidiary to all three. One may see the issue of balance of power among the three named branches of government as reflecting a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome. "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers."¹²⁰ Whether described as a "permanent guerrilla warfare" between the executive and legislative branches," or as a "duty to act . . . coupled with a duty to act with care and comity and with a sense of the higher values we all cherish,"¹²¹ the checks and balances idea embodied in the Constitution creates and demands the continuance of a "tension among the branches, with each, at the margin, limiting the other,"¹²² so that, in Madison's terms, "'ambition [could] be made to counteract ambition.'"¹²³

119. A. Sofaer, *supra* note 116, at 60.

120. R. Neustadt, *supra* note 42, at 26.

121. Levi, *supra* note 116, at 391.

122. *Id.*

123. *Id.* at 378 (quoting *The Federalist* No. 51 (J. Madison)).

B. Interpretations of the Constitutional Constraints

In addition to constitutional text and context, the interpretations given the President's place in government by courts and others during the past two hundred years influence contemporary understandings of his relationship to the agencies and Congress's power to structure that relationship. Perhaps of particular importance here is the legal folklore about independent regulatory commissions, in some versions suggesting that parts of government responsible for the administration of important government programs can be put wholly beyond the President's supervisory reach. That folkloric view should seem surprising in light of the foregoing, and indeed a close look at the cases will show that that suggestion is hardly a necessary reading; the Court never had to confront so dramatic an assertion, and our understanding of its opinions can be reconstructed without much difficulty to reflect awareness of the need to maintain a tension among the named heads of government, in which all participate.

Quite different from the folklore is the proposition that Congress is free to choose between placing ultimate responsibility for decision with the President and giving that responsibility to those to whom it has initially assigned the work of administration. Even within what is undoubtedly the sphere of executive influence—for example, the conduct of law enforcement—that proposition finds support in the Constitutional Convention's failure to adopt measures such as the Morris plan. The proposition seems undebatable where Congress can find circumstances, such as a need for objective decision, that warrant placing administration beyond the sphere of its own as well as the President's political influence. Yet note that neither choice effects or is a justification for presidential *exclusion*. However unserviceable rigid separation-of-powers arguments have become beneath the very top levels of government, the checks-and-balances idea retains force: congressional arrangements that threaten the viability of an independent, unitary executive capable of opposing the Congress's own assertions of power are, for that reason, suspect.

1. *The Early Interpretations.* — The Constitution vests all executive power in the President and, while contemplating delegation, clearly intends focused, personal responsibility for its exercise. Yet Congress could and did create responsibilities in the departments to be exercised by departmental heads, not the President. Those regimes were creatures of law, law whose faithful execution the President had as much responsibility to assure as any other; what, then, was to be his role? Attorneys general vacillated whether an appeal lay to the President from particular decisions of the secretaries, but the practice was to leave decision where the Congress placed it.¹²⁴ The difficulties were well stated in Professor Corwin's classic study of the Presidency:

124. See, e.g., 1 Op. Att'y Gen. 624 (1823) (holding that no appeal would lie); 2 Op. Att'y Gen. 480 (1831) (same); 2 Op. Att'y Gen. 507 (1932) (same); 5 Op. Att'y Gen. 630 (1852) (same); 10 Op. Att'y Gen. 527 (1863) (same); 11 Op. Att'y Gen. 14 (1864) (same); 18 Op. Att'y Gen. 31 (1884) (same); 2 Op. Att'y Gen. 463 (1831) (holding that an appeal would lie); 6 Op. Att'y Gen. 326, 343 (1854) (same); 7 Op. Att'y Gen. 453, 464 (1855) (same); 15 Op. Att'y Gen. 94, 101 (1876) (same).

Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain, with a *nominal* executive chief or president, who, however, would remain without a shred of actual power."¹²⁵

The Supreme Court had indicated in *Marbury v. Madison*¹²⁶ that a court could direct the performance of a nondiscretionary duty given to the executive.¹²⁷ In 1837, in *Kendall v. United States*,¹²⁸ it seemed to go further, giving the negative answer to Professor Corwin's question—that Congress could structure government so as to preclude the President from imposing his will on a cabinet officer.

Kendall was an action in mandamus, a direction to the Postmaster General to pay a specific sum of money which Congress by special statute had ordered paid but which the President wished withheld. At the time, as *Marbury* illustrates, a writ of mandamus was available only if it could be shown that its subject had been given no discretion in the performance of the function at issue. Finding the Postmaster under a legal obligation to pay, the Court directed that mandamus issue. It would be "alarming," said the Court, to assert that

125. E. Corwin, *supra* note 74, at 80–81. For contemporary efforts, see R. Neustadt, *supra* note 42; E. Hargrove, *supra* note 26; and Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 Tenn. L. Rev. 757 (1979).

The first Congress's differential handling of the Departments of State and War, on the one hand, and Treasury, on the other was drawn on by Freund and others to suggest a basis for distinguishing between "executive power" and "administrative power." See generally *supra* note 11. Stated as a proposition about complete congressional control, the distinction seems one example of Corwin's "flatly negative," and therefore unacceptable, answer. As a marker of differential authority, it has much more persuasive force. See *infra* note 277.

126. 5 U.S. (1 Cranch) 137 (1803).

127. See the full discussion of the case's significance for administrative law in Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1 (1983).

128. 37 U.S. (12 Pet.) 524 (1837).

Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President.¹²⁹

While this language might be understood as broadly confirming Congress's power to confer discretion on administrators beyond the President's control, the decision carefully avoided invitations to decide so large an issue.¹³⁰ Because the "duty" actually involved in the case left no scope for judgment, there was no need to decide what voice the President might have where the law offers a choice of possible courses of action—that is, where it confers discretion on the responsible administrator. The opinion holds only that the President and other executive officials must act within the law.¹³¹

Effective presidential power to control subordinates may be substantially a function of his ability to enforce his wishes, to remove persons in whom he lacks political confidence or, less broadly, who disobey his valid directives.¹³² In *Marbury*, the Court had established that for some officers of government—in this case ones we have since come to call article I judges—Congress could constrain the President's removal authority over persons he appointed and who were not constitutionally entitled to tenure.¹³³ This proposition was extended to employees in "the executive Departments" in *United States v.*

129. *Id.* at 610.

130. See the full discussion of the case, in the context of an effort to understand the President's relationship to administration, in Grundstein, *supra* note 11, at 309–19. See also Monaghan, *supra* note 127, at 14–16, 25.

131. See *Decatur v. Palding*, 39 U.S. (14 Pet.) 497 (1840). The restrictions on the effective use of mandamus are reflected in the rarity of its use during the nineteenth century as an instrument for judicial control of law-administration. See Monaghan, *supra* note 127, at 14–16; Hart & Wechsler, *supra* note 2, at 1381.

132. Presidential control has its roots in "the executive power" and the responsibility to "take care that the laws be faithfully executed," both express in the constitutional text, and not, as is often thought, in an arguable removal authority never better than implicit. While surely control is hard to effect without workable disciplinary tools in hand,

the commonly accepted explanation that the presidential control over administration is an accidental result of the possession of the power of removal [is erroneous]. The exact reverse is the true explanation. The power of removal was rather derived from the general executive power of administrative control. The latter power has not been an extra-constitutional growth. It was the conscious creation of the men who made the Constitution.

C. Thach, *supra* note 88, at 158–59.

133. 5 U.S. (1 Cranch) 137 (1803). The offices in question were for Justices of the Peace in the nation's capital, who had been given a fixed term of office. An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801). Like so much else in the opinion, the discussion of the validity of this restriction is dictum, which Chief Justice Taft sought valiantly to defeat in his opinion for the Court in *Myers v. United States*, 272 U.S. 52, 139–44 (1926). Nonetheless, he was careful to recognize the existence of special considerations supporting restrictions on the President's removal authority in such cases, *id.* at 135, 157–59. See the discussion in Bruff, *supra* note 47, at 476–78.

Perkins.¹³⁴ That case involved a claim for pay allegedly owed to naval engineers who appeared to have been assured of office for a term by statute, but who had been honorably discharged by the Secretary of War when he found no position available for them. The engineers prevailed when the Court concluded that fixed tenure had been granted:

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. . . . The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.¹³⁵

The constitutionality of the civil service was thus assured—and with it, recognition of a sharp limitation of the President's power over the personnel of executive government.

Finally, the early Court established that neither the separateness of Congress, Court, and President nor the primary responsibilities assigned to each precluded Congress from authorizing the performance of other sorts of ancillary power. For example, while the Constitution placed the lawmaking function in Congress and the dispute-resolving function in the judiciary, the courts could be authorized to adopt rules of procedure to govern proceedings before them.¹³⁶ Delegations to territorial and district governments were commonplace, objectionable only if they created a territorial government in which the three functions of government were indistinct;¹³⁷ these delegations could include authority for persons who were not article III judges to exercise unmistakably judicial functions.¹³⁸ And the President (or other executive officials) could validly be authorized to engage in rulemaking.¹³⁹

134. 116 U.S. 483 (1886).

135. *Id.* at 485.

136. Such power has been statutorily conferred since the beginning of the republic, Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 73, 83; see also 1 K. Davis, *Administrative Law Treatise* 158–59 (2d. ed 1978), and was early sustained in a noted opinion of Chief Justice Marshall, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 15–16 (1825).

137. *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

138. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). Whether the last two cases (and their successors, e.g. *Palmore v. United States*, 411 U.S. 389 (1973)) “support a general proposition [that federal judicial power must be exercised by article III judges] and three tidy exceptions . . . or whether instead they are but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night,” was the issue hotly debated by the plurality and dissenting opinions in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (Rehnquist, J., concurring), discussed *infra* notes 238–56 and accompanying text. What was not debated, however, was that Congress could to a substantial extent (and in cases particularly important from a separation-of-powers and policy perspective) place judging in the hands of federal officials outside the federal judiciary defined in article III.

Crowell v. Benson, 285 U.S. 22 (1932), sustained Congress's power to assign to federal agencies initial decision of the great bulk of factual issues in what were essentially disputes

2. *The President's Removal Power and a Formal Approach to the Place of Administration.* — The accelerating growth of national government following the Civil War brought with it the civil service laws, the first of the independent regulatory commissions,¹⁴⁰ the heightened use of delegation and heightened concerns about it, and a general worrying about the relationship of the Presidency and administration. Perhaps disturbed by the consequences of relegating all this burgeoning authority to the President's political domain, and consistent with growing faith in scientific administration, leading commentators argued that "executive" and "administrative" authority were distinct—the latter belonging to professional public administrators, who could properly be placed outside the President's direction.¹⁴¹

Understanding of the relation between the Presidency and administration was shaped by two cases of the 1920's and 30's, *Myers v. United States*¹⁴² and *Humphrey's Executor v. United States*.¹⁴³ Both tested the President's claim of inherent executive authority to remove presidential appointees from office in the face of statutory limitations on removal; both appeared to use a strictly formal, separation-of-powers approach to the place of agencies in government. The seemingly opposite conclusions to which they came are usually understood in terms of that approach as denying the independent regulatory commissions any determinate place in the tripartite structure of government.¹⁴⁴ Yet their conclusions can also be understood in light of the checks-and-balances approach, and so understood the opinions are both readily reconciled and consistent with the constitutional scheme.

Myers concerned a postmaster appointed to a four-year term under a statute which for fifty years had required senatorial assent to both appointment and removal of these officials. The President sought to remove him before the expiration of his term, without obtaining senatorial concurrence.

between private parties under a federal compensation scheme, subject only to review for factual sufficiency (not correctness) and legal accuracy. See, e.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart & Wechsler, *supra* note 2, at 338–60. The reservation for *de novo* judicial determination of "jurisdictional" and "constitutional" facts has proved troublesome, see *infra* text accompanying notes 238–56, but has not obscured the more general proposition permitting assignment of essentially judicial decision outside the article III judiciary.

139. *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813); *Field v. Clark*, 143 U.S. 649 (1892).

140. The first independent regulatory commission, the Interstate Commerce Commission, was in fact not "independent" when first created, but an element of the Department of Interior. Like so much else in American government, its evolution was the product of efforts to improve its practical workability after the lessons of experience, not the result of a new theory about the proper ordering of executive (or administrative) government; that came later. See R. Cushman, *The Independent Regulatory Commissions* (1941); W. Nelson, *The Roots of American Bureaucracy, 1830–1900* (1982).

141. See Grundstein, *supra* note 11.

142. 272 U.S. 52 (1926).

143. 295 U.S. 602 (1935).

144. See *supra* notes 15–16.

The resulting litigation was difficult and portentous; special counsel was appointed in the Supreme Court, and the cause had to be argued twice there before the Court could reach its conclusions—conclusions stated in opinions of unusual length and elaborateness. A divided Court found that reserving congressional participation in the removal of an executive officer unconstitutionally invaded the President's executive function. The Court's opinion, written by a former President, suggested that the President enjoyed an inherent authority to remove every officer of government he was empowered to appoint (other than a judge protected by article III).¹⁴⁵ It appeared to eradicate the executive/administrative distinction by establishing the President's disciplinary control as universally available.¹⁴⁶ Congress acknowledged the apparent sweep of this decision by ceasing to provide removal protections in statutes creating new government agencies.¹⁴⁷

Humphrey's Executor resulted from President Roosevelt's effort, on the authority of *Myers*, to remove a commissioner of the Federal Trade Commission before the expiration of his seven-year statutory term. Here, a statute enacted before *Myers* required specification of cause for removal, but did not require senatorial concurrence. The President suggested no "cause" for Hum-

145.

The view of Mr. Madison and his associates was that not only did the grant of executive power to the President . . . carry with it the power of removal, but the express recognition of the power of appointment . . . enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill [to establish a Department of Foreign Affairs], . . . that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 *Annals of Congress*, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since.

272 U.S. at 119 (citations omitted). Strikingly, Chief Justice Taft extended this view even to government officials performing as judicial substitutes.

[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affects the interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.

Id. at 135.

146.

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Id. at 122.

147. See, e.g., Communications Act of 1934, ch. 652, 48 Stat. 1064, 1067 (current version at 47 U.S.C. § 151, 154 (1976)) (FCC); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 885 (current version codified at 15 U.S.C. § 78a, 78d (1982)) (SEC).

phrey's removal beyond political incompatibility—a reason plainly insufficient under the statute. This challenge arose, however, at a time when presidential rather than congressional hegemony may have seemed the more palpable threat; it was decided on the same day that the Court invalidated the National Industrial Recovery Act, once the centerpiece of the New Deal, on the ground of excessive delegation to the President.¹⁴⁸ Here, unlike *Myers*, decision appears to have been easy. Acting scant weeks after argument, the Court unanimously repudiated the *Myers* dicta and found that Congress could validly impose a “cause” requirement on the discharge of a Federal Trade Commissioner; given the circumstances, the Court did not have to say what cause could be.

Reading both opinions, one is struck by their emphasis on a radical separation of powers within government, with a concomitant need to place agencies *in* one or another branch, maximally free from intrusion by the others. For the *Myers* Court, “the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.”¹⁴⁹ From placement of the Post Office Department in the executive branch and the absence of any constitutional provision for congressional participation in removal, all else followed. For the *Humphrey's Executor* Court, “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed, and is hardly open to serious question.”¹⁵⁰ As the legislative history of the Federal Trade Commission Act established a purpose that “the commission was not to be ‘subject to anybody in the government but . . . only to the people of the United States;’ . . . ‘separate and apart from any existing department of the government—not subject to the orders of the President;’”¹⁵¹ the Court said the President could exercise no authority over its members beyond the constitutionally explicit one of appointment. Viewing both the unquestioned congressional purpose to remove the FTC from politics and the agency's particular functions, the Court described it as “an agency of the legislative or judicial department of the government,”¹⁵² exercising in those contexts only an “executive function—as distinguished from executive power in the constitutional sense.”¹⁵³

More than *Myers*, but perhaps in consequence of that decision, the reasoning of the *Humphrey's Executor* Court seems open to question. Remarkably, the Court did not pause to examine how a purpose to create a body

148. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

149. 272 U.S. at 116.

150. 295 U.S. at 629.

151. *Id.* at 625.

152. *Id.* at 628.

153. *Id.*

“subject only to the people of the United States”—that is, apparently, beyond control of the constitutionally defined branches of government—could itself be sustained under the Constitution.¹⁵⁴ Later, the opinion tells us that the agency is in *both* the legislative *and* the judicial branches, because of the functions it performs, but not how an agency can at the same moment reside in both the legislative and the judicial branches, consistent with the “fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence . . . of either of the others.”¹⁵⁵ Nor does the Court explain its distinction between “executive function” and “executive power.” Of course the commission was carrying out laws Congress had enacted; in that sense its functions could hardly have been characterized as other than executive, whatever procedures it employed to accomplish its ends. And, of course, the public procedures it employed were no different than those used by any cabinet department for similar purposes.¹⁵⁶

If the formal question where in government to place the agency is put aside, however, it is not hard to understand the Court’s result. It described the FTC’s functions as follows:

154. Cf. Ackerman, *supra* note 114. The Court’s assurance about what seems a difficult question might be a product of the theoretical division between executive and administrative power (although it would be hard to locate such a division in the constitutional scheme). See Grundstein, *supra* note 11, at 287. Or perhaps it was the result of the times—not only of *Schechter*, but of growing executive totalitarianism in Europe—in which resistance to broad executive authority was only to be expected. Certainly it is noteworthy that the two (and only) successful invocations of the delegation doctrine, *Schechter* and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), each involved actions undertaken directly in the President’s name under statutes that at a time of national economic emergency, may have appeared to have thrown control of the entire process of government into the President’s hands. Congress appeared to have given that potent, apical actor free rein, setting no standards by which the courts could act as a brake on his decisions. (In *Ryan* one had the further, unedifying spectacle that the law the President created was private—hidden in an administrator’s desk, where even the Congress might not readily know what it was.) See Jaffe, *An Essay on Delegation of Legislative Power*: II, 47 *Colum. L. Rev.* 561, 571 (1947).

155. 295 U.S. at 629. Similarly formal approaches to agency placement might also be thought to underlie the troubling aspects of the Court’s near-contemporaneous judgment in *Crowell v. Benson*, 285 U.S. 22 (1932), discussed *supra* note 138. While sustaining the assignment of many “adjudicatory” questions to administrative agencies subject to judicial review, the Court there insisted on *de novo* judicial determination of so-called jurisdictional facts on which the constitutionality of applying a statute might depend, as necessary to protect the article III function. Principles that would make that reservation workable did not readily appear but—at least until apparently revived by the plurality opinion in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), see *infra* text accompanying notes 253–56—that aspect of the decision slumbered in “deserved repose.” *Estep v. United States*, 327 U.S. 114, 142 (Frankfurter, J., concurring); see also W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 293–96.

156. While rulemaking is sometimes described as “quasi-legislative” and adjudication on the record as “quasi-judicial,” see *supra* note 16, the possibility of such descriptions has not been thought to be a reason why these functions cannot constitutionally be performed in the executive. Rather, it has formed a basis for constraints on their performance: that rulemaking must be in accordance with a sufficiently defined delegation to canalize executive authority, *Schechter*

- (1) The FTC could direct cessation of unfair methods of competition in commerce, *after* full-dress adjudicatory hearings;
- (2) It could conduct investigations culminating in a report to the Congress with recommendations for legislation;¹⁵⁷ and
- (3) It could act 'as a master in chancery' in antitrust suits brought by the Attorney General and referred to it by a district court.¹⁵⁸

Assurance of impartiality and the absence of political controls of any character are centrally important to two parts of the statutory scheme as thus described; providing information-gathering service to Congress (not the President) characterizes the remainder. So far as the Court was educated to the Commission's functions, the FTC did little as to which unified policy direction was even arguably relevant.¹⁵⁹ Thus, the need to maintain tension between the named branches was not implicated. The Court was acutely conscious, however, of the extent to which the Commission acted in circumstances calling for judicial impartiality and the removal from politics that might tend to protect it.

The Solicitor General, at the bar, . . . with commendable candor, agreed that his view . . . necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether . . . the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.¹⁶⁰

Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring); that adjudication must be in accordance with procedures meeting constitutional tests of fairness, *Goldberg v. Kelly*, 397 U.S. 254 (1970); and that both (apparently, but never definitively) must occur within the ambit of judicial review, *id.* at 278 (Black, J., dissenting). See also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982); *INS v. Chadha*, 103 S. Ct. 2764 (1983).

157. The brief which Humphrey's executor filed with the court indicated that 50% of the FTC's budget was spent for this function. Although the Court has accepted this as a "legislative" function, *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976), see *infra* text accompanying notes 177-85, it is not inevitably so; the Constitution explicitly places the function of recommending to Congress "such Measures as he shall judge necessary and expedient" in the President's hands. U.S. Const. art. II, § 3.

158. *Humphrey's Executor*, 295 U.S. at 620-21.

159. The Court noted that the President was also authorized to direct investigations, but passed over that inconvenient attachment to the executive branch as "so obviously collateral to the main design of the act as not to detract . . ." *Id.* at 628 n.1.

160. *Id.* at 629 (citation omitted). Recall the ease with which Chief Justice Marshall had upheld a similar restriction on the President's removal power over judges of certain legislative courts in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *supra* note 133 and accompanying text. Contrast the rigid separations *apparently* enforced by the *Humphrey's Executor* opinion with the unconscious ease with which the Court speaks of judges of a "legislative" court "exercising the judicial power." That puzzle would return, and defeat efforts at intellectually satisfactory explanation in separation-of-power terms, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), sustaining the Court of Claims as an article III court.

Thus, the result can be fully explained by the apolitical character of the judgments to be reached, and the constitutional appropriateness, if not necessity,¹⁶¹ of assigning such judgments to an apolitical process.¹⁶²

Once fairness considerations are taken into account, these cases can be seen as explained by the difference between a limitation on independent and executive agencies, but between presidential power that implicates a struggle between the branches and one that does not. *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy.¹⁶³ Indeed, the Court acknowledged that certain types of executive activity could properly be placed beyond the President's directory power for reasons of public policy;¹⁶⁴ and that Congress could validly have given the Postmaster tenure protection by placing him in the civil service, rather than attempting to reserve a political authority over discharge.¹⁶⁵ Only heads of departments *must* be presidential appointees, and even for them tenure protection need raise no question of imbalance between the executive and legislative branches, of aggrandizement of Congress's political power at the expense of the President's. The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination. The latter measure defeats any claim that the measure has an apolitical end such as assuring objectivity.

Humphrey's Executor, in turn, could be understood as having turned on precisely this distinction between those limitations on removal where Congress

161. *Kalaris v. Donovan*, 697 F.2d 376, 398-99 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983), upheld assignment of on-the-record adjudicatory functions to persons found subject to unexplained removal by the secretary of their department.

162. *Wiener v. United States*, 357 U.S. 349 (1958), involving the War Claims Commission, underscores the point. "[T]he nature of the function that Congress vested in the . . . Commission"—to adjudicate according to law—is "the most reliable factor for drawing an inference regarding the President's power of removal." *Id.* at 353; see also *infra* text accompanying notes 199-215; Bruff, *supra* note 47, at 499.

163. See C. Thach, *supra* note 88, at 66-67, for an account of an influential experience with this problem during the Revolutionary War.

164. The Court hinted this to be so for duties "peculiarly and specifically committed to the discretion of a particular officer . . . [or] duties of a quasi-judicial character," 272 U.S. at 135. However, the opinion goes on to assert that an unintelligent or unwise exercise of these duties *could* be the reason for an after-the-fact removal.

165. *Id.* at 161.

has retained some role and those in which it has not. Whether or not one numbers the FTC among "the executive Departments," the purpose to make it "free from 'political domination or control'"¹⁶⁶ in exercising functions for which that quality is evidently desirable establishes a justification for some tenure protection. The FTC Act imposes no congressional intrusion analogous to that presented to the Court in *Myers*; on its facts, it does not even foreclose some presidential involvement in FTC policy formation. The President had given Commissioner Humphrey no particular directive; he had asked no advice that Humphrey then refused to give; he did not, perceiving insubordination, direct him to leave. His request for Humphrey's resignation was founded in failure of trust, not breach of discipline. Consequently, the Court found only that Congress could legitimately insist that one holding the office of Federal Trade Commissioner serve on terms other than those of a personal adviser. It did not have to say whether the President could give the FTC Commissioners binding directives, or if so of what sort, or what might be the consequences of any failure of theirs to honor them.¹⁶⁷

So reading *Humphrey's Executor* would underscore that presidential claims to participate in the FTC's (and other independent agencies') policy-making have not been excluded by that opinion's apparently broad statement that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . ."¹⁶⁸ "Quasi-legislative," as that Court used the phrase, referred not to policy formation but to the exercise of investigatory authority in support of reports to the Congress. Reports to the Congress, unlike rules, have no direct impact on the relationship between citizens and their government; in them, the President's claim to participate has a different character.¹⁶⁹ The FTC of that era was not a rulemaker; it reached its policy conclusions through adjudications. The concern for "quasi-judicial" agencies reflects the Court's focus on the legislative requirement of impartiality, of freedom from *any* political direction to secure procedural fairness. *Humphrey's Executor* did not consider the question whether Congress constitutionally could create an administrative body free from the political direction of the President but subject to such direction from congressmen and their committees, and empower that agency to make law.¹⁷⁰ Congress can be conceded the power to forbid unilateral presidential removal

166. *Humphrey's Executor*, 295 U.S. at 625.

167. See E. Redford, *The President and the Regulatory Commissions* 20 (1960).

168. 295 U.S. at 629.

169. See U.S. Const. art. III, § 3. While the judgment to place "the executive Power" in the President seems and was intended to exclude its unsupervised placement in others, one is hard put to imagine a need for exclusivity in recommending legislation.

170. At the time of *Humphrey's Executor* political influence on rulemaking does not seem to have been considered a problem. In part this was because the overwhelming majority of agency business was handled through formal and informal adjudication. See Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 186, 76th Cong., 3d Sess. (1940) (pt. 21); S. Doc. No. 10, 77th Cong., 1st Sess. (1941) (pt. 2). In

for "no reason at all" of an FTC Commissioner regarded as principally an adjudicator, without implying that total removal of the FTC as a policymaking organ of government from presidential oversight or control would be within its power.

3. *The Checks-and-Balances Approach to the Place of Administration: Buckley v. Valeo and the Early Nixon Cases.* — Decisions about government structure stemming from the political turmoil of the Nixon Presidency suggested that the Court might be ready to abandon the pigeonholing of agencies as "executive," "legislative" or "judicial" in favor of considering the impact of particular challenged provisions respecting them on the balance of authority among the institutions defined in articles I, II and III. The view that there exist "three airtight departments" was described as "archaic,"¹⁷¹ and seemed on its way to being replaced by a checks and balances approach that, like that of the framers,¹⁷² gave central attention to "whether [an] Act disrupts the proper balance between the coordinate branches."¹⁷³ The Court thus seemed ready to turn to the central but difficult work of assessing structural arrangements in functional terms—in terms of their contribution to or detracting from the maintenance of tensions among the named branches.

addition, much of such rulemaking as was done was apolitical in nature. The Interstate Commerce Commission, for example, had issued only 20 tariff circulars through 1939 dealing with rate setting, and these concerned the form and style of the tariffs, not their content. S. Doc. No. 10, supra, at 45 (1941) (pt. 11). In general, however, political influence was accepted as appropriate in rulemaking procedures:

In an ordinary trial the question is whether the facts bring the case within a rule or principle of law The issues are always of limited scope, relating to the particular circumstances or transactions, and the evidence bearing upon them can be incorporated into a record.

The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies. . . . Such choices must be made in the light of facts; but the chief issues are not factual. They relate either to the proper balancing of objectives . . . or to a choice of methods to achieve given objectives

It is true that the discretion thus exercised in administrative rule making operates within statutory limits and is not unfettered. Nevertheless, within these limits the important questions always are what is desirable or what is workable in order to carry out the directives contained in the statute.

Attorney General's Comm. on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 117 (1941).

171. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (quoting the U.S. District Court for the District of Columbia, 408 F.Supp. 321, 342 (1976)). See also L. Jaffe, supra note 2, at 28–30; W. Wilson, *Constitutional Government in the United States* (1908); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1387–91 (1974); Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. Rev. 92, at 92–93 (1974); Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, *Law & Contemp. Probs.*, Spring 1976, at 102.

172. Recall that for Madison the central issue was "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the other," supra text accompanying note 117.

173. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

One example of this approach is *United States v. Nixon*,¹⁷⁴ President Nixon's failing effort to resist the subpoena that made inevitable his resignation. The opinion has language that invokes the rigid separation-of-powers analysis: addressing the lawfulness of its own claim to assess the President's assertion of executive privilege in the case, the Court reasoned that "the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."¹⁷⁵ Once the Court has asserted its entitlement to pass on the claim of privilege, however, its analysis turns on "checks and balances"; the test becomes one of balance among competing legitimate claims, of possibly threatened interference with core function:

[T]he Framers . . . sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim . . . would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III. . . . [I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. . . . The President's broad interest in confidentiality of communications [while constitutionally based,] will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.¹⁷⁶

This checks-and-balances inquiry—a comparison of impacts on "essential functions"—is both diffuse and subject to conscious or unconscious manipulation; it is at the same time at the heart of the framers' formula.

This more functional inquiry assumed particular importance in *Buckley v. Valeo*,¹⁷⁷ a case concerning the necessary character of presidential and congressional relationships to an administrative agency. *Buckley* presented a series of challenges to the Federal Election Act and to the Federal Election Commission (the Commission) the Act created and empowered; significant for our purposes was a separation-of-powers challenge to a provision for direct legislative appointment of some members of the Commission. The Commission was authorized, inter alia, both to conduct investigations—the quasi-legislative activity considered in *Humphrey's Executor*—and to engage in rulemaking, the quasi-legislative activity which had not been at issue in that case. Were the FEC only empowered to conduct investigations, the Court

174. 418 U.S. 683 (1974).

175. *Id.* at 704. As a proposition that the three named actors of the Constitution must remain distinct the observation is unexceptionable; at that moment, however, the Court did not have to rationalize the phenomenon of article I courts. See *infra* text accompanying notes 238–56 (discussing *Northern Pipeline*).

176. 418 U.S. at 707–13.

177. 424 U.S. 1 (1976).

reasoned, the appointment provisions would not have been objectionable; such powers are “in the same general category as . . . Congress might delegate to one of its own committees.”¹⁷⁸ But rulemaking “represents the performance of a significant governmental duty exercised pursuant to a public law,”¹⁷⁹ and is *therefore* to be exercised only by officers of the United States—by persons subject to appointment by the President (with or without senatorial assent) or by a head of one of “the executive Departments.”

Buckley is not always clear how it is regarding the mass of government outside the legislative branch. At some points, the opinion speaks confidently of the “three essential branches of Government”¹⁸⁰ among which all powers are distributed, and writes of functions in “the administration and enforcement of public law”¹⁸¹ as if it were describing activities of one—the executive—of those three branches. At other points it seems somewhat more hesitant about the independent regulatory commissions, as when it refers to “‘Heads of Departments’ . . . [which] are themselves in the Executive Branch or at least have some connection with that branch.”¹⁸² All that was necessary, after all, was to decide that Congress could not vest in *itself* appointment power for the head of an agency that would be exercising a “significant governmental duty . . . pursuant to a public law.” Just as the Court in *Humphrey’s Executor* seems to have thought it enough for its purposes to show that the FTC’s functions were *not* executive to place the FTC beyond the President’s removal claim, the *Buckley* Court may have found it sufficient to characterize the FEC’s functions as “not legislative” to remove it from Congress’s appointments claim.

When one is playing a shell game, however, it is important to maintain the observer’s confidence that one of the shells does contain the pea, even if it is not the shell currently under examination. By characterizing as a function having to be exercised outside the legislature just that quasi-legislative activity (rulemaking) that previously had been described with some uniformity as the result of a delegation of *legislative* power, the Court destroyed that illusion, breaking through any separation-of-powers notion that the powers of government generally could be neatly parcelled into three uniquely empowered entities. The Court insisted that the central issue was to be the character of the relationships between that agency and the named heads of government, and not the formal structure of the agency in question.¹⁸³ Those conclusions could

178. *Id.* at 137.

179. *Id.* at 141.

180. *Id.* at 121.

181. *Id.* at 139.

182. *Id.* at 127; see also *id.* at 141 (functions “of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch”).

183. *Id.* at 124–43. The Court indicated that it was looking to the fundamental values of the Constitution in determining the effect of the appointments clause. It noted that the system of presidential nomination with senatorial confirmation was the final product of long deliberation on how to avoid granting any one branch excessive power over nominations. *Id.* at 127–31. It then found use of this system required whenever the test just quoted in the text was satisfied—as, of course, it was for the FEC. *Id.* at 131–43.

be reached without having to "put" the FEC anywhere; the claim to that power and relationship does not depend on where the agency "is," so much as the necessity of maintaining the desired sharing of authority among the named actors of the Constitution. In this way, the *Buckley* Court's reasoning stands the *Humphrey's Executor* distinction between executive function and executive powers on its head, repudiating the dicta about "independence."¹⁸⁴ Precisely because they exercise a substantial function in "the administration and enforcement of public law, those agencies are to be numbered among the Departments" so fleetingly and inconclusively referred to in article II. *Buckley* thus seems to have eliminated any sense that the independent regulatory agencies were somehow to be regarded as having a place in the structure of government fundamentally different from that of executive agencies.¹⁸⁵

These themes also appear in the next separation-of-powers case, *Nixon v. Administrator of General Services*,¹⁸⁶ which involved challenges on separation-of-powers grounds to the responsibilities Congress had imposed on the General Services Administration for processing former President Nixon's papers. Again the Court appeared to rely to some extent on the placement of the GSA in the Executive Branch in assessing the challenged arrangements.¹⁸⁷ Its central inquiry, however, seemed independent of location as such:

[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . [and] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.¹⁸⁸

Vigorous dissents by the Chief Justice and Justice Rehnquist sought to distinguish between what Congress might provide respecting the papers of the President himself, and what it might require of a "legislatively created [Executive] department." Yet the majority's general analytic proposition necessarily rested—as Justice Powell made express in a concurrence¹⁸⁹—on an assessment of the extent to which the President could claim, solely because the GSA was

184. Others have also suggested the problems with *Humphrey's Executor*. See, e.g., Bruff, *supra* note 47, at 478–83; Nathanson, *supra* note 30, at 1099–109; Verkuil, *supra* note 55, at 953–55.

185. This implication of the *Buckley* Court's reasoning, that "independent" agencies are within reach of the President's "executive power," was given warranted emphasis by the D.C. Circuit in its recent opinion disapproving Congress' legislative veto of a FERC rule. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 472 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).

186. 433 U.S. 425 (1977).

187. *Id.* at 441.

188. *Id.* at 443.

189. 433 U.S. at 500, 503–04 (Powell, J., concurring).

an executive agency, power to control policy outcomes and represent his views in any particular dispute over privilege before the courts.

The checks-and-balances concerns with relationship and effective functioning thus suggested seem to be paralleled by analytic developments in other contexts in which the structural constraints of the Constitution are the central issue. Debate over the tenth amendment, for example, revived by *National League of Cities v. Usery*,¹⁹⁰ resolved into near unanimity in formulating the relevant inquiry (if not its application): whether a challenged measure threatens the integrity of the states in the constitutional scheme.¹⁹¹ Allocation of authority between state and nation, like that between executive and legislature, can be understood as a means of protecting individuals from overwhelming governmental power; deciding what is required to preserve that protection for citizens has characterized the recent judicial debates more than a cataloguing of activities inherently for the states qua states. The same may also be suggested for the public debate—not yet captured in litigation—whether the Constitution constrains Congress's authority to make exceptions to the appellate jurisdiction of the Supreme Court. What would "prevent the [Judicial] Branch from accomplishing its constitutionally assigned functions?"¹⁹² is widely accepted as the appropriate inquiry to be made.¹⁹³

Inquiry along these lines has substantial advantages. It permits the judiciary to recognize the inescapable merger of some governmental functions, and permits it, as well, to tolerate periodic changes in relative political effectiveness as between President and Congress, Congress and Court, Nation and States. Our political history has been characterized by the emergence of first one and then the other as the more forceful national political presence; even if it were desirable, it seems unlikely that courts could sustain the constant intervention that would be required to maintain a fixed relationship.¹⁹⁴ Rigid molds are more easily broken; permitting growth and change makes more likely the enduring of the essential form.

Indeed, the questions formulated on this approach make largely irrelevant to constitutional analysis where a given government function—or the

190. 426 U.S. 833 (1976).

191. See, e.g., *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

192. See *supra* text accompanying note 187.

193. Hart, *supra* note 132, at 1365, reprinted in Hart & Wechsler, *supra* note 2, at 33. But cf. Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965):

I see no basis for this view [prohibiting alteration of appellate jurisdiction motivated by hostility to decisions of the Court] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power.

194. This insight appears to underlie Professor Choper's argument that the question of allocating authority between President and Congress should be left entirely to their political

bureaucracy as a whole—is placed on the governmental organizational chart. Whether “in” or “out” of the constitutional executive branch, a given agency will nonetheless have a relationship with that branch requiring the questions of “proper balance,” disruption of executive branch function, and “overriding need” to be assessed.¹⁹⁵ Whether or not the Securities and Exchange Commission is “in” the executive branch, it is within reach of the President’s article II powers to execute the laws, insofar as it executes the laws; and it may also be within reach of his article I veto authority to the extent that it exercises a genuinely legislative function. This approach, it may be noted, fits the Department of Agriculture as easily as it does the SEC. Both are hybrids in the functions they perform, legislating and adjudicating as well as executing.¹⁹⁶ Neither is within the ambit of any special executive role the President may enjoy in military and foreign affairs¹⁹⁷ and both are charged by Congress with responsibility for discrete legislatively defined tasks, in which the President’s right to participate is questionable¹⁹⁸ and subject, at least, to some forms of legislative constraint.

processes, and regarded as nonjusticiable by the courts. See J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 260–379 (1980). Professor Choper believes that President and Congress each have sufficient controls over the other’s actions, and as each is sufficiently under the control of the electorate, that judicial correction of “mistakes” is unnecessary; and, further, since any effort to contain the two branches by judicial pronouncement would expose the courts to retaliation by a far more powerful branch, such intervention is also unwise—a wasting of the Court’s limited political capital. He points out that judicial resolution of questions such as delegation and removal authority have been at best highly limited successes that would not be missed.

Adoption of Professor Choper’s proposal would require, at the least, a substantial departure from existing “political question” law, and a further dilution of the duty to decide which many regard as an essential element of judicial review. Choper’s point does not appear to be (and hardly could be) that the Constitution embodies a commitment of any questions respecting the distribution of authority between President and Congress to those two branches; that would permit, at least in theory, complete obliteration of the distinction between the two. Doubtless it is true, as he suggests, that electoral forces would inhibit sudden, massive changes, although in times of emergency even that may not be true. More significant may be the accretion of authority or practice in one or the other branch, to the point where intended capacity to function, independently and as a check on the other branch, is substantially impaired. Put in that perspective, which seems to be the perspective of the recent cases, it seems possible to preserve both substantial room for political byplay as between President and Congress, and a decisional role for the courts. See also Monaghan, *Book Review*, 94 *Harv. L. Rev.* 296 (1980).

195. “[T]he Constitution requires that executive functions be performed under direction of the President. . . . Any other rule permits the crippling of the President’s executive power and loads the quasi-judicial independent bodies with constitutional contraband.” R. Cushman, *supra* note 140, at 459.

196. See generally *supra* text accompanying notes 47–64.

197. See *supra* note 11.

198. President Nixon’s attempt to direct tax investigations for political ends was regarded as grounds for impeachment, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 141–45 (1974); his interference with antitrust actions against ITT was also open to question. Both the Treasury and the Department of Justice are cabinet departments, and the President’s instructions concerned investigation and prosecution, quintessential executive responsibilities.

C. *Separation of Functions and Considerations of Individual Fairness*

Much of the force apparently attached to the issue of “place” in the cases separating the President from the agencies has its source in considerations of fairness— notions more readily ascribed to the idea of separation of *functions* than separation of *powers*. Separation of powers, as a theoretical concern, has to do with the general tendency of certain governmental structures to result in (or prevent) tyrannical government—that is, a government no longer under the control of the people. Separation of functions suggests a much more atomistic inquiry, asking what combinations of functions or impacts of external influence will interfere with fair resolution of a particular proceeding. Recall the horror expressed by the *Humphrey’s Executor* Court at the idea that a judge of the “legislative” Court of Claims might be subject to presidential discipline in “exercising judicial power.”¹⁹⁹ That the Court accepted her sitting on a *legislative* court suggests that the issue for the Court was not (or not only) one of place but one of function. Wherever she is located in government, a judge ought not to be connected with the controversy or the parties, ought not to be interested in the outcome, must learn from the parties only what they convey in the presence of each other, and—above all—ought not to be called upon to explain her decision in the political forum. External or political intervention in on-the-record decisionmaking would be regarded as inappropriate, whether done by the President or any other political figure (e.g., a legislator),²⁰⁰ whether in an independent regulatory commission or in a traditional executive department. These are judgments we reach wholly without regard to the balance of advantage between Congress and the White House in overseeing the day-to-day functioning of political government. Within agencies themselves, executive *and* independent, these judgments are reflected in the creation of officials (administrative law judges, appeal bodies, judicial officers) remarkably free of organizational responsibilities or political supervision, who perform on-the-record judging functions.²⁰¹

This separation-of-functions rationale provides, in effect, a politically neutral basis for supporting congressional judgments about governmental structure that might otherwise appear to threaten presidential function.²⁰²

199. See *supra* notes 145-48 and accompanying text.

200. *Humphrey’s Executor v. United States*, 295 U.S. 602, 629-30 (1935); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966).

201. See W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 752-59.

202. Other neutral bases could be imagined. For example, it has long been argued that the conduct of monetary policy, although not carried out using formal procedures, must be free of the suspicion of political influence. See, e.g., the arguments of Alexander Hamilton for a national bank in his Report to the House on a National Bank of December 13, 1790, recounted in G. Gunther, *Constitutional Law—Cases And Materials* 105 (10th ed. 1980). While bankers are not by reputation evenly distributed between the two major parties or free of political interests, that judgment is nonetheless one which if congressionally made may be entitled to respect. Similarly, a few rulemakings are required to be conducted following trial-type procedures, and others are thought to be special because although in form rulemakings they produce trial-like results—allocating valuable rights among a limited number of specially interested participants. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Legislative judgments that certain types of decision are preferably made in the absence of *any* political intervention tend to defeat arguments that statutory provisions for agency independence reflect the outcome of competition between Congress and President for political dominance. Acquiescing in such judgments has no strong implications for the allocation of authority between the political branches, and raises few threats to the scheme of checks and balances. The very judgment made requires that the relationship between Congress and the agency be affected equally with that between the President and the agency; where these considerations come into play, it would be inappropriate for either to intervene unless as a party.²⁰³ The President has no regular apparatus for coordination or control over adjudication corresponding to the OMB's role in rulemaking; congressional representatives generally do not employ their oversight techniques in efforts to influence agency adjudication. Statutes sharply restrain permitted contacts in on-the-record proceedings, within and without the agency,²⁰⁴ and the courts appear sensitive to the possibility that the detachment and objectivity requisite to on-the-record decision—separation of functions as distinct from separation of powers—may have been compromised when such contacts occur.²⁰⁵ No distinction is made, either in law or in practice, between independent and executive agencies in this respect.²⁰⁶

By contrast, other agency functions are regarded as appropriate for less formal decision and for political oversight—again, whether performed in executive or independent agencies. Processes of policy formation undertaken within an existing legislative framework, in general, and informal rulemaking, in particular, are examples. These proceedings are not subject to statutory constraints on outside contacts or record formation and are not expected to occur with the antiseptic impartiality of on-the-record trials.²⁰⁷ Save for a few

203. Note that the argument here is premised on a congressional judgment having been reached about what fairness to participants may require. Although regularly enforcing on-the-record constraints, the courts have not *required* that agency adjudicators be placed beyond the possibility of political supervision. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983).

204. 5 U.S.C. §§ 554(d), 556(b), (d), 557(d)(1) (1982).

205. *American Public Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1068-70 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-64 (5th Cir. 1966).

206. See 5 U.S.C. § 551(1) (1982); cases cited *supra* note 205.

207. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981). Nathanson noted that

In the ordinary rulemaking proceedings the parties are not identified in advance. Neither are conflicting interests established in advance among those subject to the proposed regulation In such a situation the very concept of *ex parte* communications is strikingly out of place; there are no parties to begin with, and it is not known what parties will develop and what their conflicting interests will be.

Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 396 (1978). See generally Strauss, *supra* note 19, at 1036; Verkuil, *supra* note 55, at 975-76.

exceptional cases, agency rules are made following highly informal procedures not required to be on the record, and are characterized by frequent consultation within and without the acting agency.²⁰⁸ Few statutes to date, and no constitutional norm, inhibit agency officials from discussing their rulemaking decisions with staff, or even having staff participate in development and presentation of rulemaking proposals; few require such discussions to be noted or recorded.²⁰⁹ Similarly, the procedures for testing decisionmaker objectivity in adjudicatory settings are generally inapplicable in rulemaking; the rulemaker may be strongly driven by a political agenda, and reviewing courts ask only whether his mind was "unalterably closed" to persuasion on factual issues.²¹⁰ Legislators and executive officials who would not bring judges before them to explain past decisions or to be pressured respecting future ones feel and are free to engage in contemporaneous questioning of agency policymaking and to attempt to influence it.²¹¹ Perhaps the outcomes would be affected by demonstrations of political coercion, the use of legally irrelevant factors, or the use of interagency consultation to provide a conduit for the submission of private material out of public view.²¹² In general, however, the courts, like the legislature, have thus far accepted the more informal and political character of rulemaking as appropriate.²¹³

This is not to say that the issue of political participation in informal rulemaking is uncontroversial from a procedural perspective. The tempo of public debate over these issues has notably increased in recent years. Legisla-

208. Varying degrees of formality have been introduced for particular agencies in recent years through the legislative development of hybrid rulemaking procedures, more elaborate than the norm in informal rulemaking though not as formal as on-the-record rulemaking would be. See generally W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 191-210.

209. But cf. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended at 15 U.S.C. §§ 45, 46, 50, 57(a), 57(b)(1)-(4), 57(c), 58 (1982); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 551, 552, 552b, 556, 557; 5 U.S.C. app. I § 10 (1982); 39 U.S.C. § 410 (1976 & Supp. V. 1981)).

210. *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

211. See *Sierra Club v. Costle*, 657 F.2d 298, 404-10 (D.C. Cir. 1981); Weingast & Moran, *supra* note 72, at 791-92.

If there is any difference to be observed in this respect as between independent and executive branch policymakers it is that congressmen, feeling perhaps more proprietary towards the independents, feel freer to intervene in their affairs. See *supra* text accompanying note 75. Thus, powerful committees may insist on early notice of proposed rulemaking, or ask that an agency await congressional consideration of an issue before precipitously making rules. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 52 n.112 (D.C. Cir. 1977).

If there is a difference between congressmen and the President, it is that no constitutional authority directly supports the congressman's claim to suggest to the agency or department how it should interpret or apply existing law. See the discussion of *Sierra Club v. Costle*, *infra* text accompanying notes 360-70.

212. See *Sierra Club v. Costle*, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

213. See generally *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

tive changes in the direction of greater formality in the decision process have repeatedly been proposed and received broad support.²¹⁴ More elaborate exposure of the basis on which decision is reached, and explanation of the agency's reasoning process, are common ground in otherwise controversial statutory proposals for reform of rulemaking procedures.²¹⁵ But these proposals are made, as they should be, without significant regard for the character of the agency involved as independent or not. It is, in other words, important what questions are asked. "To what branch does rulemaking belong from a structural perspective?" suggests one sort of answer; and that seems often to have been the way questions have been put. "What claims do the constitutionally designated institutions have to participate?" and "What arrangements best protect the appropriate procedural claims of individual participants in agency proceedings?" suggest different sets of issues, ones that seem better matched to the procedures of government as it now functions and to the considerations that govern Congress's decisions about its shape.

D. Conflict Between the Models or a Return to Formalism? The Work of the Past Two Terms

The preceding pages should suggest that of the three approaches commonly used to describe our government's structure,²¹⁶ the checks-and-balances model, understood in light of the fairness aspirations of the separation-of-functions principle, best describes the complexity of contemporary government in terms that permit adherence, as well, to the framers' vision. The seeming bright-line simplicity of separation of powers, never in fact fully embraced by those who wrote the Constitution,²¹⁷ is neither necessary as a matter of text, context or past interpretation for those parts of government not named in the Constitution itself, nor possibly successful in describing that bulk of government as it is. Courts have been able to reconcile the reality of modern administrative government and the strict separation-of-powers model, as in *Humphrey's Executor*, only by blind feats of definition—internally inconsistent while at the same time effectively negating the ability of a unitary, competent President to serve as an essential check against legislative hegemony.

Yet an analysis framed in terms of interference with the capacity to maintain one's core function is more effective as a means of organizing debate than as a rule for deciding cases.²¹⁸ It leaves more room for judicial fact-

214. For discussion of the various reform proposals introduced in recent years, see Strauss, *Regulatory Reform in a Time of Transition*, 15 *Suffolk U.L. Rev.* 903, 911–12, 920–26 (1981).

215. *Id.*

216. See *supra* text following note 14.

217. See *supra* notes 114–23 and accompanying text.

218. For similar debate despite apparent agreement on verbal formulae, see *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983) (tenth amendment issues); see also the dissent of the Chief Justice in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 504, 511–13 (1977) (Burger, C.J., dissenting).

finding and the operation of judicial discretion than “bright-line” formulae such as those employed in *Humphrey’s Executor* appear to. To one who takes from constitutional history, above all, a sense that the framers both intended effective government and placed our protection from overwhelming government in continuing struggle among its parts rather than rigid demarcation of function, that is not troublesome. However, the bright line has its allure for justices faced with the responsibility to decide particular cases in ways that will guide the future conduct of others, future justices included.²¹⁹ The most recent outcropping of separation-of-powers cases to reach the Court suggest the justices may be responding, once again, to certainty’s siren call. Three decisions of the Supreme Court’s past two Terms,²²⁰ each the product of a sharply divided Court, suggest both the difficulties a court may encounter with a strict separation-of-powers analysis and the advantages of the checks-and-balances analysis that turns on the interrelationships of government.

1. *Nixon v. Fitzgerald and Harlow v. Fitzgerald*.—*Nixon v. Fitzgerald*²²¹ is another heritage of the Nixon years, the outgrowth in this instance of the strongly vindictive treatment alleged to have been accorded a civil servant who had “blown the whistle” on a major defense contractor. Fitzgerald sued the former President, his personal staff aides, and departmental officials for damages; the defendants asserted that their acts had been privileged. For all but the President, eight justices held in a companion case (conformably with existing precedent) that the defendants—including cabinet members and presidential aides at the highest level—enjoyed only a qualified privilege.²²² As for the President, however, five justices concluded that, at least absent a contrary statute, he enjoys an absolute immunity from civil liability for acts performed in office, by virtue of office.²²³ Four dissenters would have found the outcome no different for the President than for any other officer of government.

The cases have two implications for this essay. First, they indicate an awareness by the Court of the centrality of personal immunity to the President’s ability to perform his functions without the fear—a fear from which Congress and the courts are also protected—that the parties hurt by his policy decisions can recover damages from him. Second, the willingness of four justices to limit personal immunity for the President in a way they would not

219. See Deutsch, Precedent and Adjudication, 83 Yale L.J. 1553 (1974).

For an interesting discussion, majority and dissent, of the new virtues and vices of overthrowing an established “bright line” test in favor of a more contemporary balancing approach in the dormant commerce clause/preemption context, see *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm’n*, 51 U.S.L.W. 4539 (1983).

220. *INS v. Chadha*, 103 S. Ct. 2764 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

221. 457 U.S. 731 (1982).

222. *Harlow v. Fitzgerald*, 457 U.S. 800, 819–20 (1982).

223. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Justice Powell wrote for himself, the Chief Justice, and Justices Rehnquist, Stevens and O’Connor.

consider for the Congress or themselves, reflects an apparent failure of the functional analysis undertaken in *Buckley*—a failure underscored by the Court's refusal in the companion *Harlow* case to accord similar protection to the President's personal aides.

Although constitutional considerations plainly guided the Court's policy choice, its decision was not in a strict sense one of constitutional law. It is hard to discern to what extent the constitutional prerogatives of the Presidency join with what the majority regarded as the functional requirements of being the sole chief executive to support the conclusion that absolute immunity is appropriate.²²⁴ As in previous cases in which the Court had considered the immunities of prosecutors and judges,²²⁵ the privilege question was presented in a common law setting—that is, as a matter requiring judicial resolution in the absence of a dispositive statute—and the Court professed openness to the possibility that different factual judgments might be reached by legislators.²²⁶ The majority relied heavily on its reading of constitutional history for the proposition that the President's "unique position in the constitutional scheme"²²⁷ warrants a judicial determination of freedom from liability for damages. The opinion describes the immunity it finds as "a functionally mandated incident" of that position,²²⁸ "rooted in the the separation of powers under the Constitution,"²²⁹ and supported its finding by judicial reasoning of a familiar sort demonstrating all the destructive implications of the President's being subject even to the possibility of civil suit.

The majority's guesses about the impact of possible civil liability on the President's ability to function are merely that; the four dissenters strongly disagree about that impact as well as the reading of constitutional history.²³⁰

224. 457 U.S. at 749–54. The Chief Justice, concurring, sought to "underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers," *id.* at 758, but his disagreement with his colleagues in *Harlow*, see *infra* text accompanying notes 232–35, strongly suggests that that was a personal view.

225. See *Butz v. Economou*, 438 U.S. 478, 508–14 (1978); *infra* note 228.

226. *Nixon v. Fitzgerald*, 457 U.S. at 748 n.27.

227. *Id.* at 749.

228. *Id.* Both the majority and dissent use "functional" in two senses, without noting the difference. The first use, as here, refers to a mode of analysis like that suggested in this Article: absolute immunity derives from the need to maintain the President's function as an effective unitary executive able to balance the power of Congress. The second use refers to immunity conditioned on the type of work an official is performing: prosecutorial functions require absolute immunity, and other executive functions do not. See, e.g., *id.* at 755–57, 785. The latter, function-by-function approach is not strongly related to the structural concerns of the analysis undertaken here.

229. *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

230. From the constitutional perspective it is hard to give more than rhetorical credence to Justice White's assertion in dissent that the majority had placed the President above the law. 457 U.S. at 780. The Court has done the same for itself in its interpretation of judicial privilege, and the speech and debate clause accomplishes much the same for elected congressional officials; it would be remarkable if equivalent protection was not available for the other named principal of the Constitution. One lower court has noted this difference in treatment of the President and of legislators and judges. See Senate Select Comm. on Presidential Campaign Activities v. *Nixon*,

The differences do not appear to have been methodological; all the justices appear to have agreed that any immunity must be justified on functional grounds and that the appropriate criterion is the prospect of significant interference with official function.²³¹ The disagreement, instead, turned on the impact of this potential liability. The very fact of this disagreement over an issue of social fact, one well suited to legislative judgment, may well explain the majority's reservation of the case in which Congress has passed a statute explicitly creating the possibility of civil liability.²³² Whatever the resolution of the issue, the focus by all the justices on the impact of immunity on the ability of the President to carry out his job as unitary executive and counterweight to Congress was correct. At the same time, the sharp division on the impact question illustrates the difficulty of reaching judgments premised on considerations of constitutional structure and an assessment of impact on function.

To the extent that constitutional reasoning figures in the *Nixon v. Fitzgerald* result, it is reasoning that sharply distinguishes the President from the entire remainder of executive government.²³³ The companion case, *Harlow v. Fitzgerald*,²³⁴ held that senior presidential aides, White House officials who are the President's most intimate and responsible associates in performing the functions of his office, cannot make the same claims to quasi-constitutional protection as may the President. Like cabinet officials, they are entitled only to a qualified privilege that could be overcome by showing that they knew or should have known that the action would be tortious.

The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the

498 F.2d 725, 729-30 (D.C. Cir. 1974). Defeat at the polls, impeachment, and the liability of subordinates who inevitably will have to do the dirty work remain available remedies. To be sure, the Court has asserted that it is "not because of their particular location within the Government but because of the special nature of their responsibilities" that judicial and prosecutorial officials enjoy absolute immunity. *Butz v. Economou*, 438 U.S. 478, 511 (1978). For this reason, the Court extended the immunity to judges in administrative agencies as well as to article III courts, to prosecutors in the independent SEC as well as to those in the Department of Justice. Nonetheless, no article III judge (or his state equivalent) lacks the privilege even for conduct only arguably judicial, see *Stump v. Sparkman*, 435 U.S. 349 (1978), and in this sense absolute privilege is at least hinted to be part of the constitutional structure.

231. See 457 U.S. at 755-57 (majority); *id.* at 785 (dissent).

232. Another possible reason for leaving open the question of statutory reconsideration may lie in judicial recognition that the like assessment of immunity for judges and prosecutors could be taken as an indication of its vulnerability to self-interest. Whether persons acting as judges or prosecutors enjoy an absolute privilege had been decided on the basis of the justices' necessarily intuitive (and self-interested) judgments about the special nature of judicial and prosecutorial responsibilities, together with the opportunities for correction of error that exist in the litigation context. See *Butz v. Economou*, 438 U.S. 478, 508-14 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978).

233. 457 U.S. at 749-53 & n.31. The case in this respect adopts what had been a dissenting perspective offered by the Chief Justice in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). See *supra* text accompanying notes 186-89.

234. 457 U.S. 800 (1982).

“functional” approach that has characterized the immunity decisions of this Court Our decision today in *Nixon v. Fitzgerald* . . . in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President’s acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.²³⁵

The Chief Justice, dissenting, would have extended the President’s privilege to his personal aides, who like the legislative aides in *Gravel v. United States*²³⁶ (or law clerks whose immunity is yet untested), are but “alter egos” to their bosses.²³⁷ For the other justices, however, separation of powers as a constitutional matter concerns the President, not the presidential office or agencies performing the daily work of government. Their reasoning can be criticized for its failure to accept for the President, as they had for Congress and themselves, a realistic need for trusted personal aides to carry out his job as a unifying force and a counterweight to Congress. Yet the result also underscores the Constitution’s silence about the structure of the agencies, and the possibility of treating them as lying outside its explicit structures although subject to the control of all three named bodies.

2. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* — *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²³⁸ demonstrates the difficulty of applying a strict separation-of-powers analysis to governmental bodies other than the three named actors of the Constitution, and suggests the greater utility of the checks-and-balances model. The case arose out of a provision in the amended bankruptcy act creating bankruptcy judges outside of article III (although subject to review by article III courts). These judges were given a range of powers closely resembling those of article III judges and authorized to decide all matters in the bankruptcy proceedings—including issues in litigation between private parties that would ordinarily be resolved in state courts (for example, the existence of a contractual obligation), but that might be swept into the bankruptcy proceedings. Their

235. *Id.* at 811 & n.17.

236. 408 U.S. 606 (1972).

237. The Chief Justice argued that the lack of absolute immunity for cabinet officials need not imply the same lack for personal aides:

[The dissent in *Nixon v. Fitzgerald*] suggests that a President and his cabinet officers, who serve only “during the pleasure of the President,” are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his “elbow aides” from the role of Cabinet officers, who are department heads rather than “alter egos.” It would be in no sense inconsistent to hold that a President’s personal aides have greater immunity than cabinet officers.

457 U.S. at 828 (Burger, C.J., dissenting); see also *Senate Select Comm. v. Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974).

238. 458 U.S. 50 (1982).

judgments would become final if unchallenged, but were subject to review, ultimately by article III courts. One question for the Court was whether the Constitution requires bankruptcy issues to be decided by article III judges, or whether it suffices for Congress to place initial decision in other hands, subject to the possibility of judicial control—whether, for purposes of the Bankruptcy Act, judges must be “in” the judiciary or merely controlled by the judiciary. If article III judges must decide, a second and related issue arose—whether the bankruptcy judges could be regarded as “adjuncts” to the courts, acting within article III although not article III judges, like United States magistrates. No majority of the Court could agree on a structural resolution, although six justices agreed that article I bankruptcy judges could not properly decide private disputes arising under state law that would ordinarily be decided by state courts.

The Court’s resolution of the first issue—what adjudicatory business must necessarily be submitted to article III judges—is the matter of chief interest here.²³⁹ Justice Brennan’s plurality opinion²⁴⁰ appeared to seek a bright-line definition of what types of action were inherently judicial and thus had to be performed within the judicial branch, rather than being overseen by it. On the basis of an inquiry into constitutional text, history, and the Court’s cases, the opinion identified three classes of cases, apparently judicial in character, that need not be tried in article III courts: cases heard before territorial courts or the courts of the District of Columbia (for which Congress enjoys plenary legislative authority), cases properly assigned to courts-martial, and decisions respecting claims against government that Congress would be free to commit entirely to executive discretion.²⁴¹ All other federal adjudicating must be done by article III judges.

The dissenters²⁴² examined the same materials as the plurality but came to a sharply differing conclusion: the Court’s cases permitting the assignment of judicial functions to other than article III judges cannot be reconciled with any theory of the article that requires all stages of certain types of decisions or

239. The second argument, that bankruptcy judges might be regarded as adjuncts to article III courts, drew principally on the decisions in *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980). The plurality’s negative conclusion was grounded chiefly in the extensive powers granted bankruptcy judges over the matters before them, which it characterized as including “all ‘essential attributes’ of the judicial power.” 458 U.S. at 84–85. As a feature distinguishing the Bankruptcy Act provisions from those that had been upheld respecting workmen’s compensation commissioners (*Crowell*) or United States magistrates (*Raddatz*), this characterization of the scope of authority is persuasive. See *Kalaris v. Donovan*, 697 F.2d 376, 388 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983). Yet the more striking characteristic of this argument is its assumption that one *must* place the agency-adjunct *within* the judicial branch. If judicial and other powers must be rigidly separated, this argument saves the “judicial” function *only* at the cost of abandoning rulemaking and executive functions. Thus, this argument, too, ultimately demonstrates the frustrations of applying a strict separation-of-powers approach below the three named heads of government.

240. Written for himself and Justices Blackmun, Marshall and Stevens.

241. 458 U.S. at 64–70.

242. Justice White wrote for the Chief Justice and Justice Powell.

functions to be conducted in article III courts.²⁴³ Modeling their analysis on *Buckley's* inquiry into impact on function, the dissenters would have disapproved the creation of legislative courts on constitutional grounds only if they concluded that such tribunals threatened to emasculate the courts, aggrandizing the authority of the political branches at their expense and depriving citizens of the protection that can be supposed to come from an independent judiciary's authority finally to resolve issues of law—that is, if the use of legislative courts threatened to disrupt the scheme of checks and balances. The legislative courts created by the Bankruptcy Act pose no such threat because they are specialized, deal “with issues likely to be of little interest to the political branches,”²⁴⁴ and are subject to review by article III courts on terms that protect the core judicial functions of determining the meaning and application of law, and of exercising some control over determination of the relevant facts. Evidently, however, the dissenters' judgment that no such threat was present—like judgments about the impact of tort liability on the performance of official function—is highly subjective and open to debate.

In many respects, the opinions are astonishing.²⁴⁵ No majority of justices could agree on proper methodology for analysis of primary issues of constitutional structure. Nor could a majority agree on identifying what central functions of the judicial branch Congress could not place elsewhere, or on which materials to rely in answering that question, or even on whether a coherent body of decision (using whatever referents) must ultimately emerge from a course of decisions. Three members of the Court went so far as to suggest that the justices could abandon the effort to give meaning to the Constitution's words—that the development of precedent and practice had made it “too late” to rely on the “simplicity of the principle pronounced in Art. III.”²⁴⁶

Although the plurality opinion did not deny that Congress's authority to create administrative bodies is extensive, the Court's disagreement whether (or when) the judicial function can be satisfied by judicial oversight nonetheless raised fresh questions about the viability of statutory arrangements for administrative adjudications long accepted as proper in the presence of adequate provisions for judicial review. As the plurality itself recognized, only the last of the three categories it identified—the “public rights” doctrine of *Murray's*

243. *Id.* at 105–13 (White, J., dissenting). Justices Rehnquist and O'Connor, concurring, limited themselves to the proposition that removal of a case that would otherwise be decided by state common law courts to federal bankruptcy jurisdiction required that the federal court of destination be an article III court. *Id.* at 91.

244. *Id.* at 115 (White, J., dissenting). At the opposite end of the spectrum are criminal defendants and the objects of intended speech regulation, whose cases often hold deep political interest.

245. Not the least surprising aspect of the decision was the Court's assertion that it could continue in effect for an interim period an allocation of judicial authority that it had found Congress could not constitutionally enact. *Id.* at 88; 103 S. Ct. 199 (extension of stay of mandate); 103 S. Ct. 662 (refusal to grant second extension).

246. 458 U.S. at 113 (White, J., dissenting).

*Lessee v. Hoboken Land & Improvement Co.*²⁴⁷—might permit avoiding the shadow thus cast on adjudications performed within “the executive Departments” or, at least, outside the article III judiciary. Under that doctrine, if “Congress would be free to commit such matters completely to nonjudicial executive determination . . . there can be no constitutional objection to Congress’s employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.”²⁴⁸ But to make administrative adjudication turn on whether Congress could commit the matters completely to nonjudicial executive determination is both insufficient and unhelpful.

The Court’s analysis is insufficient because it leaves in shadow a great deal of administrative adjudication. As the plurality seemed to recognize but not confront, the whole point of the “public rights” analysis was that *no judicial involvement at all* was required—executive determination alone would suffice.²⁴⁹ If the availability of judicial review is a due process requisite of some administrative adjudications—and the cases seem to be telling us that it is²⁵⁰—the “public rights” analysis does not support the initial administrative determination in those cases.²⁵¹

The plurality’s analysis is unhelpful because it avoids the central question in the case: if article III control by judicial review is constitutionally satisfactory for resolution of disputes concerning public rights that could not be made subject to wholly executive disposition—a point thought to have been passed long ago—why is it not equally satisfactory for the resolution of disputes concerning the bankruptcy laws? The difficulty is heightened by the apparent agreement by plurality and dissent that in congressionally created programs Congress can assign adjudication to agencies, not article III courts, when the dispute is between the government and private citizens.²⁵²

This is not the place to work out a theory of judicial task under article III that distinguishes fully among those settings in which article III courts must perform their functions *de novo*, those in which article III courts must be involved *at least* to the extent of supervision of other tribunals’ results, and those in which article III courts need not be involved at any stage.²⁵³ What

247. 59 U.S. (18 How.) 272 (1885).

248. 458 U.S. at 68 (citation omitted).

249. The plurality hinted at the necessity of judicial review to support some types of administrative adjudication, *id.* at 69 n.23, but failed to see how that cut against reliance on the “public rights” doctrine.

250. *Goldberg v. Kelly*, 397 U.S. 254 (1970), repudiated the corresponding proposition—that since government didn’t have to create welfare programs it was free to adopt whatever procedures it might wish for denying welfare claims—while broadly indicating the constitutional necessity that judicial review be available. See also, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977) (administrative assessment of civil penalty).

251. Nor can the agency-as-adjunct argument be made without embracing an equally large contradiction. See *supra* note 239.

252. 458 U.S. at 80 (plurality); *id.* at 94 (White, J., dissenting). One would think, however, that judicial impartiality is even more important when one party is the government than when not.

253. See Monaghan, *supra* note 127, at 18–20 (discussing *Crowell* and *Northern Pipeline*).

must be evident, however, is that the second of these sets can no longer be treated as empty, whatever may once have been the case.²⁵⁴ And if it is not empty, the "public rights" doctrine cannot provide valid responses to separation-of-powers questions involving the judiciary. The central test to determine the appropriateness of an administrative structure must be the effectiveness of a relationship with article III courts to achieve the ends sought by article III, rather than the placement of a function in article III. This will be so whether one analyzes that relationship with a political impact test of the sort offered by Justice White, an historical analysis seeking out those questions most closely associated with jury and/or judicial decision, a comparison of regulatory regimes with the judicially administered remedies they replace, or some other alternative. While it seems entirely possible to defend the result in *Northern Pipeline* on some such terms,²⁵⁵ the plurality approach reopens doors long thought nailed shut. We have in fact agreed that the review relationship is adequate to assure article III protections in all but the most extraordinary of situations, including many in which that relationship could not constitutionally be dispensed with.²⁵⁶ Seen in this light, the plurality's assurances that administrative adjudications were not put in doubt by its approach to *Northern Pipeline* ring hollow; that a separation-of-powers argument could not be employed without casting so much doubt on central arrangements of government long thought secure suggests the difficulty of that approach.

3. *INS v. Chadha*. — Equally large questions were raised about settled arrangements of government and the viability of "separation of powers"—in this case, respecting the activities of article II legislators, rather than article I judges—by the decision last Term in *INS v. Chadha*,²⁵⁷ the legislative veto case. It is some indication of the disarray in the Court respecting separation-of-powers issues that the three opinions reaching the constitutional issues in *Chadha*, deeply differing with one another on both approach and outcome, were written by the three justices who had joined the previous term's dissent in *Northern Pipeline*. I have written at some length elsewhere²⁵⁸ about the diffi-

254. That is, for some of the cases we have been sweeping in under the "public rights" label, due process considerations would prevent Congress from leaving non-article III actors free of the control of judicial review.

255. Thus justices Rehnquist and O'Connor suggested that the displacement of common law cases from state courts of ordinary jurisdiction to a federal bankruptcy tribunal requires the use of article III tribunals in light both of the character of the cases and the special considerations that come into play when state authority is displaced. 458 U.S. at 90-91.

256. One need consider only the disappearance of the "constitutional fact" question from contemporary teaching and thinking about administrative law, once the Court's decision in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), and widespread use of administrative law judges had settled issues about the possible objectivity of administrative fact-finding. See also Monaghan, *supra* note 127, at 18-20.

257. 103 S. Ct. 2764 (1983).

258. Strauss, *supra* note 5.

culties of the several opinions²⁵⁹ in that case. There, I sought to show the importance of a distinction no justice had observed, between use of the veto in matters affecting direct, continuing, political, presidential-congressional relations and use of the veto in a regulatory context. I argued that the Court had to reach only the latter situation and that only that situation presents the constitutional difficulties that troubled the Court. Here, my purpose is to focus on the implication of the Court's failure to make that distinction for the choice between the separation-of-powers and checks-and-balances models in assessing congressional arrangements for governmental structure. The *Chadha* majority's invocation of the compartmentalization inherent in "separation of powers" cast doubts that it struggled to dispel on the continued viability of agency rulemaking; attention to checks-and-balances issues could have resolved the case without imposing that doubt—or, for that matter, undercutting the utility of the legislative veto in the political context.

Jagdish Chadha was a deportable alien found by an immigration judge of the Department of Justice's Immigration and Naturalization Service (the Department) to have established a claim to a compassionate suspension of deportation under section 244 of the Immigration and Nationality Act.²⁶⁰ Under that statute, refusals so to find are subject to judicial review while favorable findings are to be transmitted to Congress, to take effect only if neither the Senate nor the House of Representatives repudiates them by resolution during the two sessions following.²⁶¹ In Mr. Chadha's case, the House adopted such a resolution at the last possible moment, without printed text, debate, or significant explanation. The issue before the Court²⁶² was the validity of that resolution—that is, of what might be described as the condition Congress attached in conferring on immigration judges the authority to suspend deportations. This problem had two aspects: the first, unimportant here, was whether the "legislative veto" regime must meet the formal constitutional requisites for legislation, bicameral consideration and presentment to the President for possible veto;²⁶³ the second was whether the regime violated

259. The Chief Justice, writing for himself and five others, found the legislative veto unconstitutional in an opinion broadly indicting all such provisions; Justice Powell, writing for himself, would have decided the case on grounds applicable principally to this statute; Justice White dissented in an opinion that seemed unqualifiedly supportive of the legislative veto. Justice Rehnquist also dissented, but on the nonconstitutional ground that (in his view) the suspension and legislative veto provisions of the statute were not severable, so that effective relief could not be given to Chadha.

260. 8 U.S.C. § 1254 (1982).

261. This mechanism—the occasion for 111 out of 230 legislative vetoes ever exercised by Congress under any statute through the summer of 1982—had been adopted to substitute for a prior practice of granting all such relief through private bills passed by the Congress, while maintaining congressional control. See Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258 (1983).

262. A number of procedural hurdles not relevant here had to be passed before the Court could reach the merits.

263. The majority's reasoning on that point was conclusory. Of course the formal requirements must be met before Congress can adopt some new statement of affirmative principle as law

the separation of powers by granting to Congress functions reserved to the President or the courts.

In finding such a violation, the majority opinion strikingly returns to the formalities of *Humphrey's Executor* at the same time as it repudiates the particular use to which they were put in that case. Although denying any purpose to suggest that the three branches of government are "hermetically sealed," the opinion makes its dominant metaphor an expression of fear lest the "hydraulic pressures" of power-seeking burst the boundaries of each branch's appropriate function—a palpable evocation of the "air-tightness" of the *Myers-Humphrey's Executor* approach.²⁶⁴ Where the *Humphrey's Executor* Court accomplished its ends by placing "quasi-adjudication" and "quasi-legislation" outside the executive branch, however, the *Chadha* majority identifies both as executive branch activities²⁶⁵—a characterization consistent with *Buckley v. Valeo*²⁶⁶—and thus finds a significant question whether Congress has usurped the President's power.

Note that the decision here subjected to congressional review cannot easily be characterized as the President's: it was made in the first instance by a civil servant strongly protected against political interference in his judgment and required by statute to decide the case before him "on the record."²⁶⁷ The difference between decisions that are explicitly presidential and those that are not is that the compartmentalization inherent in the separation-of-powers idea is an essential element of the framer's plan only for the former. Special questions *are* raised when the acting body is one of the named actors of the Constitution—Congress, President, and Supreme Court—who occupy the apex of power and whose excesses are for that reason the most greatly to be

binding upon the citizenry or the government. The problem for the case was to determine whether they properly apply to a standardless, contentless expression of disapproval of an immigration judge's decision, with no possibility of expressing more than a simple negative as to the (proposed) suspension of a particular deportation order whose validity had been made conditional on the failure of either house to express such a negative. The Chief Justice's majority opinion solves the problem by treating the immigration law judge's action and the House resolution as distinct legal acts—as if the suspension were a final act, then reversed by the resolution. He is thus enabled to characterize what the House did in *Chadha's* case as "altering . . . legal rights," 103 S. Ct. at 2784, and hence (in his view) within the requirements of bicameralism and presentment. Yet, under the statutory scheme as Congress enacted it, *Chadha's* technical right to remain in the country could not be conferred by the INS alone; it is conferred if the INS acts *and then neither house of Congress does*. To say that he has acquired a right that the House is now purporting to take away is to assert the desired conclusion, not to reason to it. See generally Strauss, *supra* note 5.

264. 103 S. Ct. at 2784; see *supra* text accompanying notes 149-50.

265. 103 S. Ct. at 2785 n.16.

266. See *supra* text accompanying notes 177-85.

267. Immigration judges are neither statutory administrative law judges nor bound (in terms) by the Administrative Procedure Act, 5 U.S.C. §§ 551, 553-710 (1982); see *Marcello v. Bonds*, 349 U.S. 302, 309 (1955). Nevertheless, they serve under statutes and well-established rules and administrative arrangements providing equivalent safeguards from political oversight. See 8 U.S.C. § 1252(b) (1982); 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 5.7 (1982); 2 *id.* § 8.12(b) (1983).

feared. It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the document. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads,²⁶⁸ the same risks do not arise; agency actions are of lesser concern than the President's for just this reason. Presidential actions are more threatening to the stability and balance of government, to the containment of power at its apex, than any authority given an agency under partial control of all three named heads of government is likely to be.²⁶⁹ For the agencies, the questions of relationship suggested by *Buckley* and *Nixon v. Administrator of General Services* have greater constitutional significance.

The problem with using a compartmentalization approach below the very apex of government is illustrated by the trouble the majority encountered in rationalizing agency rulemaking. Reconciling the proposition that an action that alters legal rights is "legislative in purpose and effect" with its characterization of rulemaking as an executive function²⁷⁰ posed the same difficulties for the Court as it had had to face, in the context of agency adjudication, in *Northern Pipeline*. "To be sure," the Court acknowledged, "rule making . . . may resemble 'lawmaking,'"²⁷¹—indeed, from the familiar perspectives of administrative law, the end product of rulemaking resembles lawmaking far more than did the House Resolution in *Chadha*. But, asserts the Court, since the President is doing it, it is not "lawmaking": "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,"²⁷² quoting Justice Black's troubling majority opinion in *Youngstown Sheet & Tube*. Both halves of this proposition—that the President himself is acting when an agency adopts a rule, and that the activity is not "lawmaking"—are seriously problematic.

The very purpose of delegation is to permit the delegate to create legally binding prescriptions—that is, to act *as if* it were a legislature, albeit within legislatively created substantive and procedural constraints. Of course the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to statutory authorization.²⁷³ If the President

268. For the immigration judge, one such control might be judicially enforced apoliticality. For example, many would think *Chadha* would have had a cogent complaint had the President called the Attorney General on the telephone and instructed him to tell the sitting immigration law judge that *Chadha's* deportation order was not to be suspended, because the President had concluded that the statutory criteria were not met; it would be asserted that Congress had validly delegated the function of on-the-record decision to the immigration law judge, irrespective of "where" in government he might be placed. See *supra* text accompanying notes 199–206.

269. See *supra* note 154.

270. *Chadha*, 103 S. Ct. at 2784, 2785 n.16.

271. *Id.* at 2785 n.16.

272. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). As Professor Bruff has pointed out, the opinion must be understood as the product of a context in which no issue of delegation was involved. "Justice Black's separation of powers analysis was sufficient to dispose of the case at hand, but it was unduly simplistic. His broad dictum . . . is refuted by the reality of executive power under most legislation." Bruff, *supra* note 47, at 472.

273. Indeed, in recent contexts the Court has stressed this point by insisting on explicit statutory authorization for any agency seeking to adopt "legislative"—that is, legally binding—rules. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

is himself engaging in rulemaking under delegation, then the argument that "lawmaking" is restricted to the legislative branch is in serious difficulty.²⁷⁴ The Court seems to make the *Youngstown* passage mean: "The President does not act legislatively because he is the chief executive; the House does, because it is part of Congress. What the President does is *ipso facto* executive; what the Congress does, legislative."²⁷⁵ The Court identifies agency rulemaking with presidential rulemaking; it then asserts that, because the President can only act executively, rulemaking is safe from any claim that requirements of presentment or bicameralism apply—however like lawmaking it is.

Freeing ourselves of the equation of presidential with agency action would make it possible both to acknowledge the lawmaking character of rulemaking and to place it in the constitutional structure in ways that promise continued adherence to the basic values of the constitutional scheme. Congressional delegations of regulatory authority are most often made not to the President, but to some executive branch or independent agency. It is, to say the least, not at all clear that the President is entitled to participate in the proceedings of these bodies to the extent suggested by calling him the delegate.²⁷⁶ Since rulemaking may seem especially problematic when it is in fact performed by the President, one ought not rush to identify an agency with him when its functions remain generally in the control of all three branches of government. Treating an agency as if it were inevitably "here" or "there" tends to create the logical puzzles we have seen the Court working so hard to avoid.²⁷⁷

Suppose the Court had been willing to dissociate the agency from the President and had focused primarily on the question of the relationships between the agency and the three named heads of constitutional authority. From that perspective the legislative veto issue might have looked rather different. The question would then be what impact the legislative veto could

274. Reconsider, in this light, the Court's negative reaction to the delegation in the National Industrial Recovery Act, see *supra* text accompanying note 148, and its emphatic statement in *Humphrey's Executor*, on the same day it took that action, that precisely because the agency was acting quasi-judicially and quasi-legislatively, it was "in" the legislative and judicial branches, and "no part" of the executive branch. See *supra* notes 148–53 and accompanying text.

275. Another suggestion that the Court intends this approach is found in a repeated "presumption" that a governmental body is acting within its delegated sphere. See *Chadha*, 103 S. Ct. at 2784.

276. See, e.g., *United States v. Nixon*, 418 U.S. 683, 694–96 (1974) (departmental regulation freed special prosecutor from direction by President in prosecutorial choices, a quintessentially executive activity); *Sierra Club v. Costle*, 657 F.2d 298, 405–08 (D.C. Cir. 1981) (discussion of presidential participation in rulemaking). For further discussion, see Nathanson, *supra* note 30, at 1099–109; Strauss, *supra* note 5, at 807–12; Verkuil, *supra* note 55, at 963–70.

277. The *Chadha* Court came close to realizing the problems of a formal separation-of-powers analysis when it distinguished the Department of Justice's action from the House of Representatives' by invoking the functional consideration that the Department's actions had been authorized, and consequently limited, by a statute. 103 S. Ct. at 2785 n.16. That fact, with the attendant processes of review, made the bicameral process unnecessary as a check. Understood as a proposition that the actions of the Department of Justice were not a matter of concern precisely because they were *not* the President's but the actions of a subordinate part of government, this distinction may be helpful.

be expected to have on the President's own relationship with the agency and, in particular, on his claim to function as the sole head of government. A veto mechanism need not defeat such a claim; indeed, the more it seemed that the action being taken was fairly to be characterized as the President's own, the less objectionable the veto might be. From a checks-and-balances perspective, the need for cross-checking institutions of control is the more urgent where authority is to be exercised by one of the named heads of government. For example, in the reorganization context it might readily be argued that Congress could afford to confer the authority to initiate restructuring of government on the President only if it reserved the counterbalancing possibility of "legislative veto" disapproval. The President, gaining the initiative through the authorizing legislation, would hardly lose in the exchange.²⁷⁸

Where the action clearly is not the President's, on the other hand, the legislative veto begins to appear, not as a device for sharing enlarged responsibility within government, but as a means for enhancing congressional political controls at the expense of presidential ones. At least within a certain range, we have seen that Congress readily can exclude the President from political control of regulatory outcomes.²⁷⁹ Yet the rationale for these measures, and for the apparent offense they give to the President's claim to serve as the unitary head of executive government, equally requires that Congress exclude itself from such controls. A measure that enhances Congress's political controls while isolating the President would threaten both his position as unitary head of government, and his continuing capacity to function as a political counterweight to Congress. Thus, in *Chadha*, Congress's reserved power to disapprove a proposed suspension is made even more problematic by the "on-

Taken as an assertion of the difference between the necessary controls over the actions of the President and those over the actions of the Congress, however, the Court's argument proves too much. The House's action, no less than the Department's, was authorized and limited by a statute, and could occur only within its terms—subject, no doubt, to judicial correction if they were exceeded.

If, for example, the House had sought to act after the statutory time had expired, or to attach a condition to Chadha's remaining, it seems clear that habeas corpus would have relieved him of any deportation order and established his right to permanent residence. That the House's judgment *within those bounds* did not have to be explained and was not open to review suggests other bases upon which the statutory mechanism could be questioned. See Strauss, *supra* note 5, at 799. However, it is hard to understand how these difficulties turn the House's exercise of its very limited options into a "legislative" act. The judgment suspending Mr. Chadha's deportation order was equally free of the possibility of review (unless in the Congress, pursuant to the act), even if entered in an entirely unauthorized manner—for example, in response to a bribe, or, less dramatically, without considering one of the required factors or in consideration of an irrelevant one. The *Chadha* Court did not find in this a reason to regard the Department's action to be legislative; indeed, it seemed to take reassurance from the fact that the most lawless of acts by the INS suspending an otherwise valid deportation order would not be subject to correction in any forum. 103 S. Ct. at 2787 n.21.

278. See Strauss, *supra* note 5, at 815. For an indication of the trouble sown by the Court's approach, compare *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), with *Muller Optical Co. v. EEOC*, 33 Fair Empl. Prac. Cas. (BNA) 420 (W.D. Tenn. Nov. 10, 1983).

279. See *supra* text accompanying notes 199–206.

the-record'' regime within the Department that impairs direct presidential control. If the President is excluded from directing that a given rule be adopted, amended, or rejected while Congress is able to assert that authority, one has lost the intended focus of responsibility and balance.

Viewed in another light, such a use of the legislative veto is an end run around the President's claim to participate in legislative action through his own veto; if Congress could by a single legislative act establish a body subject to its political domination and free of presidential control for the adoption of positive law, then the engine for veto avoidance would have been defined. The difference between this view and what the Court appeared to be doing in *Chadha* lies precisely in the amount of attention given the actual role of the President in the action made the subject of a possible legislative veto. Under this view, it is not the veto alone, but the veto in conjunction with the congressional delegation of power away from the President—the assertion of differential claims to political control favoring the Congress and tending to create a multiheaded executive—that is the objectionable measure. Note that it is not necessary in this analysis to know where in government the agency is located, or how to characterize the function it is performing.

* * *

The preceding review of the existing institutions of American government and of the body of textual, contextual and interpretational constraints bearing upon them should cast doubt on the idea that our Constitution *requires* that the organs of government be apportioned among one or another of three neat "branches," giving each a home in one and merely the possibility of relations with the others. President, Congress and Supreme Court are undoubtedly to be distinct in form and in function; below that level the text does not speak, sharp distinctions are frequently hard to find in fact, and the Court's occasional efforts to find them in theory have repeatedly led to embarrassments.

Thus to recognize that most of administrative government²⁸⁰ lies outside the constitutionally defined structure would not defeat the purposes either of separation of powers or of the system of checks and balances. The notions of checks and balances and (as an identifier of strong claims to attenuate political controls across the board) separation of functions are more vital in understanding the place of agencies in government. So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself both of explaining fully the results of past inquiries into the permissible structures of government below its apex, and of preserving the framers' vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny. This approach reflects common political science and presidential perceptions of the way government actually works without the evident conceptual embarrassments of "the qualifying 'quasi.'"²⁸¹

280. See *supra* note 11.

281. See *supra* note 16.

A focus on checks and balances could tend to emphasize struggles among the three branches for positions of control, and to ratify the bureaucrat's sense that he constitutes a legitimate fourth force in government, making control that much harder. Such a focus would be consistent with article II's references to the President, rather than an executive branch, a limitation which seems to have figured so prominently in the result in *Nixon v. Fitzgerald*. This approach might also provide the means that many have sought to understand the administrative functions of government without requiring either radical dissociation of agencies from the controlling institutions outlined in the constitutional text²⁸² or total abnegation of judicial control over congressional choices respecting governmental structure.²⁸³ Emphasizing the preservation of unresolved tension among the named branches also aids in understanding the allocation of control authority and control mechanisms as between the President and Congress. If the question is how much control the President must be permitted to exercise, this model underscores the absence of any significant distinctions between the independent commission and most if not all executive departments. There remains a single President as the politically responsible head of law-administration.

III. "CHECKS AND BALANCES" AS A LIMIT ON CONGRESS'S AUTHORITY TO CREATE THE STRUCTURE OF GOVERNMENT

This Part of the essay supposes that government agencies charged with administering public law are *not* to be regarded as having been placed in one or another branch but rather exist as subordinate bodies subject to the controls of all three. Having thus put the agencies, in some sense, "out" of the executive branch, perhaps the most pressing question that remains is what if any relationship between an agency and the President might Congress (and the courts) still be required to honor. The issue what constraints exist on Congress in giving structure to government is thus to be assessed under the somewhat elusive checks-and-balances approach partially adopted in *Buckley* and *Nixon v. Administrator of General Services*.²⁸⁴

From the text, three principal constraints emerge: that the President must appoint at least the head of any agency doing the work of government; that the agency in doing that work must have a relationship with the President consonant with his obligation to see to the faithful execution of all laws;²⁸⁵ and that, in particular, the President must have the authority to demand

282. See, e.g., Grundstein, *supra* note 11.

283. Cf. Choper, discussed *supra* note 194.

284. See *supra* text accompanying notes 171-98.

285. One need not force a choice between the active and caretaker views of the Presidency, E. Corwin, *supra* text accompanying note 125, to observe that both imply *some* relationship with the chief executive consistent with his position as chief executive. However much the authority to decide might be put in the agency itself, a capacity to place it there does not imply the further step—deeply destructive of the constitutional scheme—of placing it there subject to the political supervision of others than the President.

written reports of the agency prior to its action on matters within its competence, with the strong implication that consultation if not obedience will ensue. Central to the overall judgments of the Constitution, and reflected in these textual passages, is the elementary judgment that we were to have a unitary, politically responsible head of government, possessed of sufficient independent authority to serve as an enduring counterweight to the political muscle of Congress. Arrangements destructive of such a role—whether creating a “multiple executive,” defeating the possibility of presidential political responsibility for the work of government, or threatening the President’s continuing capacity to resist the Congress—are for this reason suspect.

This Part argues that these constraints at a minimum require that Congress observe a principle of parity in its treatment of the possibility of political control of agency action by itself and by the President. Fairness and separation-of-*functions* considerations may often support exclusion of an agency or at least certain types of agency action from the domain of politics generally. However, Congress cannot expect to reserve political oversight for itself without recognizing corresponding oversight responsibilities in the President. Yet parity is a minimum; the President by virtue of his office as chief executive may be able to claim relationships beyond the constraints of parity. Recognition by the courts of a constitutionally based claim of executive privilege—that is, of private communication with agencies directly responsible for law-administration—is the most obvious example of such a claim. A more controversial claim would be for a requirement that Congress recognize presidential authority to resolve or mediate at least some types of internal policy disputes—for example, those placing separate agencies in direct confrontation with each other—or requiring judgments beyond a particular agency’s ordinary responsibility and expertise.

The extent to which the President must have ultimate decisional control over all executive actions is also a function of the constitutional history. The rejection of the Sherman position, envisioning a multi-headed executive dominated by Congress,²⁸⁶ provides a reference point at one end of the spectrum. Its rejection underscores the decision to make the President an effective, unitary executive. Within the range of permissible structures, the proper degree of presidential involvement was left undetermined. Nonetheless, his powers vis-a-vis government in general and Congress in particular were to be sufficient to give some assurance of maintaining a continuing tension over ultimate political authority between himself and Congress—no one branch was to become dominant. Rather than choose between the competing views of President as executor and President as overseer of execution, I want to argue that even the lesser of these views, when understood in a way that supports these structural imperatives, would imply the need for a substantial presidential relationship with any agency performing a significant governmental duty exercised pursuant to public law.

286. See *supra* notes 97–112 and accompanying text.

Thus, Congress's authority to create the government's structure must be constrained in a manner that will preserve essential conditions of the President's intended political responsibility for the day-to-day, law-implementing activities of government. Even the most modest notion of what constitutes executive power suggests that the President must retain substantial lines of communication and guidance. To deny the President that authority would be to deprive him and the public of that responsibility, and effectively to permit the Congress, again, to establish multiple centers of law administration primarily under its control.²⁸⁷ Similarly, the execution of not a single law but many inevitably raises questions of priority, conflict, and coordination that rarely are addressed in any of the acts concerned; particular departments, with their narrow responsibilities, may be incapable of appreciating the interplay.²⁸⁸ Attending to these conflicts seems an inevitable aspect of a chief executive's function. That a legislature creates a statute and makes its application mandatory, or perhaps dependent upon stated circumstances, does not mean that the legislature will bestow the resources necessary to achieve that end, that it ever "intended" full enforcement, or that it has carefully thought through the relationship of the new mandate to those that have preceded it and those that will follow. In addition to resolving these conflicts and setting priorities among statutes, is the practical requirement of coordinating law-administration with political program and molding both to changing circumstances. The day-to-day course of national affairs generates new issues to which a coherent response must be made and for the resolution of which the public will hold the President politically responsible.

As we saw in the preceding Part, the Court has found that the inquiries suggested by the checks-and-balances notion often lead to imprecise results. Yet the difficulties at the margin of saying whether given arrangements threaten "core functions" that are themselves imprecise—whether one is speaking of the President's functions, the Court's, or the states'²⁸⁹—are not sufficient justification for refusing the inquiry. Although the stakes may be higher, the task thus facing a court does not differ in principle from the paradigmatic judicial task in reviewing acts of administrative discretion of determining whether that discretion has been abused.²⁹⁰ The very existence of discretion marks a zone within which the court is not permitted to substitute judgment, but must respect the higher authority of the agency acting to

287. See *Sierra Club v. Costle*, 657 F.2d 298, 405–06 nn.520–26 (D.C. Cir. 1981).

288. Roads to Reform, *supra* note 55, at 70–72. One need not work for long in a prosecutor's office, a quintessentially "executive" place, to appreciate how legislators, reacting episodically to public demands for protective law, people the landscape with laws in far greater number than can reasonably be enforced, with laws that conflict with each other or encroach upon one another, and with laws that, although stated in mandatory form, clearly require priority ordering and reconciliation.

289. See *supra* text accompanying notes 171–98, 238–56.

290. In administrative law terms, the review function is to be thought of in terms of § 706(2)(A) review for *abuse* of discretion rather than § 701(a)(2) exclusion of review of action "committed to agency discretion by law." 5 U.S.C. §§ 701(a)(2), 706(2)(A) (1982).

determine the matter before it. Yet maintaining that discretion within a framework of law also implies that the court will on occasion be able to determine that the agency's discretion has been abused. The court can make that determination easily where straightforward violations of governing law can be identified, and with more difficulty when it can only point to a diffuse combination of factors operating in a particular context as the basis for its judgment.²⁹¹ Undoubtedly Congress has been given enormous discretion in shaping the instruments of government within the constitutional scheme; yet maintaining the Constitution as an instrument of law does not permit us to characterize this discretion as being without ascertainable constraint. Professor Choper asserts that courts should treat all these structural questions as "political," and hence decline review.²⁹² "Political question" may in fact be an appropriate sobriquet for that range of discretion Congress undoubtedly has, the area within which it is free to express its judgment.²⁹³ To deny judicial function in assessing the limits of that discretion, however, would connote not merely judicial modesty but also a denial of the role of law and, ultimately, a denial of the vision of law as perpetuating the constitutional order.²⁹⁴

A. Constraints Arising Out of the Constitution

Whether or not an agency is to be equated with the President in some constitutional sense, the constitutional text directly requires three forms of relationship between the President and the head of that agency: the President is to appoint the agency head with the advice and consent of the Senate;²⁹⁵ the President may require the agency head to give an opinion, in writing, "upon any Subject relating to the Duties of [the] . . . Office[]"²⁹⁶; and, most diffusely, the relationship must otherwise be such as to permit the President effectively to "take care that the laws be faithfully executed."²⁹⁷ Examination of these required relationships shows their link to the preserving of tension among the named branches; the link to that necessary condition, in turn, permits a more confident analysis of these requirements.

1. *The Appointments Power.* — *Buckley*²⁹⁸ reflects the first of these relationships, which appears to be well understood and—as that case reflects—readily susceptible of enforcement. Congress has not entirely given up the effort to create institutions over which it or its delegates, rather than the

291. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

292. See *supra* note 194.

293. See Henkin, *Is There a "Political Question" Doctrine?*, 85 *Yale L.J.* 597 (1976).

294. See Monaghan, *supra* note 194, at 302–06.

295. U.S. Const. art. II, § 2, cl.2. The "Advice and Consent of the Senate" is waivable by Congress if one understands the agency heads as "inferior Officers" whose appointment "Congress may by Law vest in the President alone."

296. U.S. Const. art. II, § 2, cl.1.

297. U.S. Const. art. II, § 3. See generally *supra* text accompanying notes 85–93, 97–112.

298. *Buckley v. Valeo*, 424 U.S. 1 (1976).

President, enjoys or shares appointment authority. In its most recent effort, the creation in late 1983 of a new form for the United States Civil Rights Commission (the Commission), Congress sought to use the possibility left open by *Buckley* of congressional appointments to agencies not performing "a significant governmental duty."²⁹⁹ Until 1983, the Commission had been composed of six members appointed by the President with senatorial confirmation to terms of indefinite length, under requirements of bipartisan affiliation³⁰⁰ such as have generally characterized "independent regulatory commissions." When President Reagan proved unable to persuade the Senate to confirm nominations he had made to replace some of its sitting members, he purported to remove those members from office without replacing them (and also without asserting cause). The ensuing controversy³⁰¹ was terminated by compromise legislation³⁰² reconstituting the Commission as a body of eight members serving six-year terms—four appointed by the President without requirement of confirmation but subject to bipartisanship requirements, and two appointed by each of the chief officers of the houses of Congress, on recommendation of the party leadership in each house.³⁰³ Potential *Buckley* problems were recognized but answered, it was thought, by denying the

299. *Id.* at 141. Another recent example involving congressional appointments, the Cost Accounting Standards Board, is discussed briefly below. See *infra* text accompanying notes 341–44.

300. That is, no more than half the members of the Commission could belong to any one political party. Civil Rights Act of 1957, 42 U.S.C. § 1975(b) (1976) (amended 1983).

301. Two of the three commissioners ostensibly removed in this way brought suit, based on *Humphrey's Executor*, to enjoin interference with their continued performance of duty. *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, 32 Empl. Prac. Dec. (CCH) ¶ 33,925 (D.C. Cir. Nov. 30, 1983). The district court judge granted a preliminary injunction on finding in the legislative history sufficient indications that the Commission had been intended to be independent and its commissioners, therefore, removable only for cause. The court regarded the problem of the commissioners' apparently indefinite terms as answered by the temporary character of the commission; as the commission was itself authorized for only a few years at a time, requiring periodic reauthorization, the terms of the commissioners could be regarded as fixed by the term of the Commission. *Cf. Wiener v. United States*, 357 U.S. 349 (1958) (similar reasoning with respect to independent War Claims Commission). The preliminary injunction was continued in effect during an appeal, and the district court opinion was then vacated as moot when the authority of the existing Commission expired and the substitute arrangements discussed in the text were enacted. *Berry v. Reagan*, No. 83-2184 (D.C. Cir. 1984).

Compare *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983), in which members of the Department of Labor's Benefits Review Board (the Review Board) were found not to have such "for cause" terms and thus could be removed by the Secretary of Labor without cause having to be stated. The members were departmental, not presidential, appointees, and the Review Board's permanency precluded arguments that its duration marked the effective fixed term. *Id.* at 395–96. The court did not have to consider whether the unexplained removals of the Review Board members resulted from efforts to influence particular on-the-record proceedings before them, and acknowledged that such efforts could raise due process claims for particular litigants. *Id.* at 399 n.91.

302. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 1984 U.S. Code Cong. & Ad. News (97 Stat.) 1301.

303. *Id.* § 2(b).

Commission any law-administering function. Its only authorities were to conduct investigations and to make reports³⁰⁴—activities as much within the authority of Congress as the President, and thus not presenting the issues that had driven the *Buckley* result.

Putting aside any questions whether in fact the *Buckley* dicta support this arrangement,³⁰⁵ the first appointments to the Civil Rights Commission under the new design highlight the weaknesses of a system that substitutes divided, unchecked powers for the checks-and-balances approach. Part of the asserted political compromise that led to the new arrangements was an understanding that the President and relevant congressional officials were going to use their appointment authority to install particular nominees, including two of those the President had purported to fire.³⁰⁶ Other appointments were made,³⁰⁷ however, and it immediately became evident that the unchecked authority to appoint conferred by the new scheme offered far less opportunity for political struggle than had the prior arrangements.

The prior arrangements, one might have thought, set terms fixed by the possibility that the President might nominate *and the Senate confirm* replacements; in effect, that is the termination point for the commissioners of many current independent regulatory commissions, who may serve past the end of their designated terms if a successor has not yet been confirmed.³⁰⁸ The President's effort under the previous statute to obtain confirmation of the replacements—appointments the new arrangement permits to be made unchecked—had failed precisely because of the requirement that he propose publicly the action he meant to take and because of the ability of opponents then to bring effective countervailing pressure to bear in another political forum. That the President and Congress may now each select half the membership of the Commission free of any need to secure the approval of the other, in other words, has produced a significantly diminished check on the outcome as a whole.³⁰⁹ And that the President and Senate may not now together effect a change in the membership of the Commission without "cause" gives those unchecked political appointments, once made, extraordi-

304. *Id.* § 5.

305. See *supra* text accompanying notes 177–82. While investigation and reporting are distinctly auxiliary functions that might be performed by any of the three branches in pursuit of its own functions, the Civil Rights Commission was to perform them as ends in themselves, carrying out statutory delegations. Inevitably the simple fact of such activities and their results can affect the lives of private citizens in important ways. Cf. *Hannah v. Larche*, 363 U.S. 420 (1960). One might on this basis construct an argument that presidential appointment of the heads of this agency is required, but that argument need not be pursued here.

306. *N.Y. Times*, Dec. 17, 1983, at 9, col.6.

307. *Id.*

308. While a person holding such an office may appear subject to greater personal pressure than one holding office for a fixed term of years, the tenure enjoyed is still more definite than that associated with service at the President's pleasure.

309. Compare *supra* note 183.

nary staying power.³¹⁰ In this way, the apparent purposes of the appointments clause have been undercut.

2. *Opinions in Writing.* — In contrast to the appointments power, often enough the occasion for important constitutional litigation, the opinions in writing clause may seem one of the Constitution's more trivial pronouncements.³¹¹ The Supreme Court seems never to have had to decide a question of its application. Given, however, *Buckley's* perception that all persons heading agencies charged with law-administration are "Officers of the United States" within reach of the appointments power, it would seem to follow that all are the "Heads of Departments," and consequently subject to the requirement that they respond to presidential requests for opinions in writing.³¹² Certainly both presidents and independent agencies seem so to have understood the relationship, although the President has not always insisted upon it. Thus, at least two presidents have been publicly advised by the Department of Justice that they would be entitled, as a legal matter, to insist that independent regulatory commissions as well as cabinet departments supply them with analyses of the probable economic impact of proposed rules.³¹³ Presidents who regarded the United States Civil Rights Commission as independent, in the sense that they could not obstruct its actions or dictate its reports, acted as if they were entitled to a preview of those reports and an opportunity to discuss them; and the Commission, like its more directly regulatory counterparts,³¹⁴ willingly responded.³¹⁵

310. Although the question of Congress's authority to limit presidential removal of government officials, not addressed in the text of the Constitution, has long been associated with the express power of appointment, see *supra* notes 145–47 and accompanying text, the question seems part of the larger issue of presidential discipline over the agencies' performance—an aspect of his constitutional duty to "take care that the laws be faithfully executed" and of his unshared political responsibility if they are not. See *supra* note 132.

311. Justice Jackson characterized the clause as "trifling" in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 & n.9 (1952)—an authority so self-evident that the drafters' decision to express it cast doubt on broad constructions of executive authority. Its only recent application, *State v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978), produced a holding that the President's constitutional authority to seek the advice of the Secretary of the Interior could not be burdened by the requirements of the National Environmental Policy Act. See also Proto, *The Opinion Clause and Presidential Decision-Making*, 44 Mo. L. Rev. 185 (1979).

312. Although the text of the opinions in writing clause speaks of "the executive Departments" and the appointments clause merely of "Officers" and "Heads of Departments," it would be captious to regard the clauses as differing in their referents. Resolution of the issues respecting executive power did not occur until the final days of the Convention, under pressures that produced understandably imperfect drafting. See, e.g., *supra* note 108. See generally *supra* text accompanying notes 97–113. No indication appears of any thought that different referents were intended. Although the framers appear to have expected that law-administering authority would be delegated to others than the President, the fact remains that no other part of the Constitution speaks directly to the character of their relationship with him.

313. See *supra* notes 76–78 and accompanying text.

314. See W. Cary, *supra* note 66, at 18–19, 23–24.

315. See, e.g., Memorandum in Opposition to Appellant's Emergency Motion For Summary Reversal, at 46, *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, 32 Empl. Prac. Dec. (CCH) ¶ 33,925 (D.C. Cir. Nov. 30, 1983). President

Regarding the opinions in writing clause as expressive of the President's necessary relationship with those parts of government responsible for administering its laws would have sharp implications for congressional controls. No agency could be made so independent of presidential oversight as to deny that relationship. There could be no obligation of reporting to the Congress only, and thus any congressional notion that "the independent agencies are ours" must fail. Beyond that simple negative, the strong implication of having such a clause—confirmed by what is known of the discussions that preceded its adoption³¹⁶—is that the communication the President may demand would be one made to him in private and made in time for relevant action or response on his part (that is, prior to the agency's own final decision). These requirements would obtain whether the President were entitled to direct the outcome, only to speak to it, or merely to be informed what is likely to occur. Conversely, public, after-the-fact notification would deny any effective President-agency relationship and would inhibit the President's capacity to mobilize the remainder of government to respond to the measure being taken. These impacts would be heightened were Congress to assert that it or its agents should be given private advice on some issue within the agency's responsibility or be informed in advance of the public announcement of some agency decision.³¹⁷

Suppose, however, that Congress itself abjures any such claim, and that the decision to be taken is one readily understood as requiring action outside any suspicion of political determination—for example, decision in an on-the-record adjudicatory setting. Has the President nonetheless an opinion-in-writing claim to be privately informed on the matter in issue, before public announcement of decision, in spite of the appearance of possible political influence? It is difficult to fashion a *structural* argument that would protect a decisionmaker other than an article III judge from such a claim, for any such argument would deny the presidential role.³¹⁸ Yet the appearance that the President was claiming a prerogative to subvert on-the-record adjudication was the very difficulty that seemed to contribute so strongly to the Court's

Kennedy is said to have complained about not being able to block the release of a CRC report critical of his policies because of the Commission's "independence." Implicit in this account was that he had and used an opportunity to consult with and try to persuade the Commission. Id.

316. See *supra* text accompanying notes 97–112.

317. The Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379(d)(2) (1982), exempts certain rules promulgated under the Act by the Secretary of the Interior from Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (reprinted in 5 U.S.C. § 601 note (1982)), the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1982), and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. §§ 3501–3520 (Supp. V 1981). The President responded to this direct assault on executive authority by invoking inherent executive power to achieve the control equivalent to that provided under the inapplicable statutes and authority. Statement on Signing H.R. 4084 Into Law, 17 Weekly Comp. Pres. Doc. 1111 (Oct. 9, 1981); see Verkuil, Symposium on Presidential Control of Rulemaking: An Introduction, 56 Tul. L. Rev. 811 (1982).

318. See *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983) (no structural argument to prevent removal without cause from on-the-record decision responsibilities).

denial of the executive function in *Humphrey's Executor*.³¹⁹ Some basis upon which to support a congressional judgment defeating such a claim seems essential for judicial acceptance of the resulting adjudications.

An argument to this end might be constructed along other than structural lines, relying on the claims for fairness inherent in the separation-of-functions model. The assertion would be that Congress could determine that one constitutional claim (the President's power to require an opinion in writing) had been trumped by another, the litigant's claim to a decisional process freed from the suspicion of improper influence.³²⁰ The argument would be tenable, however, only if Congress had made clear that its objective was to create an apolitical process. And the argument would be no different if made respecting the judicial officer of the Department of Agriculture than if made about the Securities and Exchange Commission. In either case, Congress would have to pay a considerable price, its own abstention from efforts at political direction or else raise significant problems from a checks-and-balances perspective.³²¹ This approach allows us to avoid the necessity of having to say that an agency exempt from the opinion in writing mandate is "in" the article III judiciary,³²² and permits Congress to give voice to its judgments about fairness without threatening to unbalance the intended tensions among the government's political branches.

3. "*Take Care that the Laws Be Faithfully Executed*". — As Professor Corwin³²³ and others³²⁴ have noted, the Delphic responsibility of the President to "take Care that the Laws be faithfully executed"³²⁵ does not tell us whether the President has authority to direct the affairs of government beyond that which statutes confer. What is important to note, however, is that the uncertainty is not unlimited. Whether this phrase implies that the President is to be a decider or a mere overseer, or something between, it requires that he have significant, ongoing relationships with all agencies responsible for law-administration. The unitary responsibility thus expressed, and sharply intended,³²⁶ does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally

319. See *supra* text accompanying notes 150-53.

320. Compare the Court's reasoning in *United States v. Nixon*, 418 U.S. 683 (1974), discussed *supra* text accompanying notes 174-76.

321. See *infra* text accompanying notes 333-46.

322. As we know, *Crowell*, *Humphrey's Executor* and *Northern Pipeline* notwithstanding, it is not.

323. See *supra* text accompanying note 125.

324. The argument that the President himself may exercise the discretion statutorily delegated to others, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), seems to render much of the remaining text of article II superfluous, and the President's personal authority unworkably large. See also Ledewitz, *supra* note 125, at 763-70, 788-93.

325. U.S. Const. art. II, § 3.

326. See *supra* text accompanying notes 97-101.

believe in that responsibility. The charge to "take care" implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient.

The proposition that Congress must allow some scope for presidential oversight of any law-administrator does not preclude its choosing by statute to place the responsibility for decision in a department rather than the President. Thus, primary responsibility, as well as the capacity, for detailed decision-making properly lie in the agencies to which rulemaking is assigned. Both agency decisionmaking and presidential oversight of an agency's performance may take into account only those factors that the statutes establishing them permit as relevant.³²⁷ Since the Constitution does not itself resolve the tension between President as administrator and President as political counterweight to Congress,³²⁸ a court would be hard pressed to deny Congress the choice in a particular setting of treating him as administrator.³²⁹ That assignment is itself a part of the law to the faithful execution of which the President must see. If, for example, EPA or OSHA is statutorily forbidden to consider economic cost as an element in a safety decision, that statutory preclusion is part of the law to be executed and consequently a constraint on its execution—for the President, as well as for the responsible agency.³³⁰ Presidential participation, like agency decision, seems possible only within the area of discretion that a particular law establishes. In any event, the President has only those resources Congress chooses to appropriate to him,³³¹ and these are insufficient for him to make the detailed substantive decisions required by the statutes.

However, the presidential oversight function must in some sense be recognized; even an administrator has power and is not merely a clerk. Significant possibilities for legitimate presidential involvement can be identified and in fact appear to make up the bulk of presidential intervention efforts: seeking and providing information to promote coordination and awareness of national policy issues affecting law execution, requiring analysis or responses on matters suggested by national policy concerns relevant to the agency's charge, or directing that given perspectives be further considered within the framework of relevance established by the agency's organic statutes. All these

327. See, e.g., *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981).

328. See *supra* text accompanying notes 102–13, 125.

329. Perhaps a different question would be raised by congressional measures so thoroughgoing that they seemed to fix the President's character as administrator across the board—thus resolving an intended tension.

330. See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981). An indication that costs *were* considered would be the occasion for a summary reversal on judicial review of the resulting rule. See *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); *Texas Medical Ass'n v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976); *Florida Dep't of Health & Rehabilitative Servs. v. Califano*, 449 F. Supp. 274 (N.D. Fla.), aff'd mem., 585 F.2d 150 (6th Cir. 1978), cert. denied, 441 U.S. 931 (1979). Senate Comm. on Government Operations, Study on Federal Regulation, Vol. II: Congressional Oversight of Regulatory Agencies, S. Doc. No. 26, 95th Cong., 1st Sess. (1977).

331. See *supra* note 118.

actions are consistent with the statutory assignment of decisional responsibility to the agencies, the President's resources and vantage point, and his obligation to "take care" that *all* laws are faithfully executed. None need compromise the ultimate decisional authority of the responsible agency or disregard the factors that Congress may have identified as relevant to its decision by implying a substitution of presidential for agency judgment.³³²

B. The Requirement that Congress Observe Parity in Political Oversight

The Constitution and the structural judgments it embodies require, at a minimum, that Congress observe a rule of parity in providing for political oversight of any government agency it creates. Congress cannot favor itself in providing for political oversight of an agency that administers, as well as assists in the formulation of, its laws. A rule that presidents may not, but members of Congress may, seek to bring political influence to bear on the policymaking of any agency directly affronts the framers' purposes,³³³ and serves no apparent function beyond aggrandizement of congressional power at the expense of the President's. Members of Congress are as capable as presidents of making excessive telephone calls or passing on private views under the guise of policy guidance, and often have done so; congressional hearings, for example, are used at sensitive stages of policymaking as instruments of coercion as well as of inquiry.³³⁴ Yet Congress's constitutional *raison d'être* is not to oversee the execution of laws; it is to enact new laws as required. Political pressure from the Congress or its members, is, if anything, *more* objectionable than similar pressure coming from the White House.³³⁵ At the least, the judgment that policymaking should not be subject to political direction must apply for congressional as well as presidential pressures. To conclude otherwise is to reverse the Convention's central decision about the Presidency.³³⁶

332. The distinction between supervision and substitution is one reasonably well understood, if not invariably practiced, by courts as well. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the Court piously states that it is supervising only: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

333. The willingness of the drafters to see Congress begin its annual session as late as the first Monday in December, U.S. Const. art. I, § 4, cl. 2, is itself evidence that an active presidency was expected.

334. *American Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1069 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).

335. The President, unlike Congress, has independent authority deriving from the constitutional text and his position as chief executive to bring his (political) viewpoint to agency decision-making. See *supra* text accompanying notes 295-332.

336. See *supra* text accompanying notes 97-101. Support for the general idea that Congress and the Executive have a mutual duty to acknowledge and reconcile each other's important constitutional obligations can be found in *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127-31 (D.C. Cir. 1977); see also *United States v. House of Representatives*, 556 F. Supp. 150, 152-53 (D.D.C. 1983).

Consider in this light an aspect of the pre-*Chadha* debate over the legislative veto that put the prevailing myths about independent and executive agencies in sharp relief. The White House at one time suggested that the legislative veto was objectionable only if rulemaking authority had been placed "in" the executive branch, and had thus unilaterally invaded the President's article II authority to execute the laws.³³⁷ Under this argument, the legislative veto would not be objectionable if Congress could have kept the delegated rulemaking authority entirely away from the executive branch, say, by placing it in an independent agency. Because rulemaking had thus been made a "legislative act," the argument went, a legislative veto respecting FTC rules was said to be less open to objection than one applying, say, to rules adopted by the Department of Education.

The argument seems precisely backwards, because it fails the parity test. The strongest argument made in support of the legislative veto—the one I have argued ought still to prevail in the context of direct presidential action in the arena of political action³³⁸—arises in those cases in which the initiative subject to the possibility of veto is actually the President's. The President's involvement assures parity,³³⁹ and thus makes it possible to say that "the possibility of undue legislative encroachment—the focus of the Framers' stress on the veto power—is minimal."³⁴⁰ If the President cannot himself control the promulgation of the rule because, for example, it is the product of an "independent regulatory commission," then law has been changed through a process redolent of congressional political control and requiring congressional approval, without presidential participation; an engine for avoidance of the veto in the formulation of statutory policy has been created.

The need for parity can be further illustrated by referring to an obscure and lapsed authority of government, the Cost Accounting Standards Board (the Board). This body was established to devise a standard body of accounting principles for use in all negotiated defense contracts.³⁴¹ Such contracts constitute over ninety percent of the total number of government contracts, and standard principles were thought likely to result in substantial cost reductions. Because executive branch officials were regarded as subject to political

337. The current Administration offered a compromise to congressional committees considering a general legislative veto statute: the President would not object to a statute that reached only rules of independent regulatory commissions. See Hearings, *supra* note 76, at 7.

338. See Strauss, *supra* note 5, at 806.

339. That is, in this setting the legislative veto scheme most closely approaches practical equivalency to ordinary legislation; unless Congress (by failing to veto) and the President (by permitting a proposal) agree that a new rule is to take effect, the law remains as it was before; the concurrence of all three is required to effect a change. In the regulatory setting, however, other problems remain. See Strauss, *supra* note 5, at 808–09.

340. *Atkins v. United States*, 556 F.2d 1028, 1065 (Ct. Cl. 1977) (*per curiam*), cert. denied, 434 U.S. 1009 (1978).

341. 50 U.S.C. app. § 2168 (1976); see generally Hearings to Consider the Status of the Cost Accounting Standards Board and a Proposal to Transfer Its Authority to the General Accounting Office: Hearings Before the House Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (1979).

and contractor pressures, and had not in fact succeeded in developing a body of agreed accounting principles, Congress established a five-member board under the chairmanship of a congressional official, the Comptroller of the United States, to develop rules to take effect unless disapproved within a stated brief time by Congress.³⁴² Once promulgated the rules were administered by the Defense Department. Departure from Board standards resulted in the imposition of a penalty on the contractor, a result indistinguishable from what would have occurred if Congress had adopted the standards by statute. The standards were adopted following procedures resembling ordinary informal rulemaking under the Administrative Procedure Act, but the Board's work was excluded from all provisions for judicial review; once adopted, the standards lay before the Congress for sixty legislative days and took effect unless disapproved by concurrent resolutions.

One might think that these arrangements would fall under the weight of *Buckley's* reasoning respecting the appointments power, although the Court has left in place a contrary judgment of the Court of Claims.³⁴³ But even if one assumes the appointments provisions might be sustained,³⁴⁴ serious questions about the manner in which the agency was to conduct its rulemakings remain. The agency is completely severed from presidential control, but remains under close political control by Congress; it enacts rules that govern governmental contractors and the Department of Defense alike, and even the possibility of judicial review of the resulting standards appears to have been excluded. Such a mechanism, if permitted here, would quickly teach Congress how to avoid presidential controls, and would sacrifice the unitary character of the Presidency. In asserting for itself political connections denied the

342. 50 U.S.C. app. § 2168 (1976). The Comptroller originally opposed placement of this "executive branch function" in his agency, the General Accounting Office, but later expressed satisfaction that the Board had been able to remain free of political pressures that would have distorted an executive order. Hearings to Consider the Status of the Cost Accounting Standards Board and a Proposal to Transfer Its Authority to the General Accounting Office: Hearings Before the House Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 63-64 (1979).

343. *Boeing Co. v. United States*, 680 F.2d 132 (Ct. Cl. 1982), cert. denied, 51 U.S.L.W. 3756 (U.S. Apr. 12, 1983). Under the Cost Accounting Standards Act, 50 U.S.C. app. § 2168 (1976), the CASB's standards "shall be used by all relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. app. § 2168(g) (1976). The Court of Claims held that regardless of either the constitutionality of the act, or the Defense Department's mistaken assumption that the law compelled it to adopt the standards, the adoption of the standard by the department was valid, whatever the departmental motivation for doing so. *Boeing Co. v. United States*, 680 F.2d at 141.

344. It might be argued that by placing appointive authority in the hands of the Comptroller General, Congress sought to use its article II authority to "vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments." U.S. Const. art. II, § 2, cl. 3. The Comptroller General, although an official of Congress, is appointed by the President with senatorial consent for a term of years made unusually long in an effort to assure independence. The argument that he could be regarded as the "head" of the Cost Accounting Standards Board, a separate statutory agency, is placed in some doubt by the circumstance that his authority on the CASB concerning its one substantive responsibility (the generation of standards) was identical to

Presidency over an organization charged with law-administration, the Congress signalled the gravest of insults to the constitutional scheme.

This proposition about parity is not an especially strong one. In particular, so long as Congress does not treat itself more favorably than it does the President, the parity notion does not preclude a congressional judgment that some agency policymaking should not be subject to political direction by the President. From this perspective, the "independent agency" may simply reflect an ordering of governmental function that Congress would be free to extend to most if not all government.³⁴⁵ Government officials who are not heads of departments may be placed in the Civil Service, remote from presidential discipline, even though Congress could not insist on having an opportunity to approve their removal. Nonetheless, the acceptance of a requirement of parity in political oversight would establish an outer limit susceptible of both understanding by the Congress and application against it. That congressional understanding, in itself, might be thought likely to influence congressional judgments about the extent to which political controls would be warranted in a given situation.³⁴⁶ In creating "independent" agencies, Congress would have to give up the notion that "they are ours." Acceptance of this reasoning, by requiring acts of self-denial, should constrain the frequency with which the judgment to create agency independence is in fact made. If one can imagine circumstances in which freeing a governmental body from some or all political controls would be inappropriate, one can equally imagine substantial political hurdles to any such outcome.

C. The President's Claim to Effective Communication

One of the requisites of even a minimal oversight relationship, confirmed as we have seen in the opinion in writing clause, is a channel of communication with the agency being overseen, communication which—at least absent special justification—may be conducted in private and maintained as confidential. Absent the capacity to talk effectively, the oversight relationship and the intended political responsibility that attends it could hardly be said to exist. This is not the place for a general essay on executive privilege, but some

that of his fellow board members. The vote of each counts equally; no other commission or board treats members as "inferior officers" subject to the chairman's appointive authority.

345. As already noted, *supra* note 11, defense and foreign affairs functions are special; the measure of congressional control over domestic law-execution is far larger. Its breadth is illustrated by the plurality reservation in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), discussed *supra* text accompanying notes 221–32, of the question of an express congressional provision for presidential tort liability.

346. To Mark Rotenberg I owe the observation that the characteristic differences in these political controls will render complex any assessment of the balance between them. Congressional oversight and appropriations hearings have an institutional character associated with legislation, as presidential controls are an outgrowth of executive discretion. The differences ought not to be surprising and reflect the vitality "separation of powers" does have as applied to the named actors of the Constitution. That apples and oranges are not strictly commensurable, however, does not negate a proposition that if one is on the plate in abundance, so must be the other.

broad features should be noted in preparation for a limited discussion of congressional prerogatives of control.

1. *Executive Privilege as a Claim Applicable to All Law-Administrators.*—The claim to executive privilege, often enough disputed in particular applications, is nonetheless generally recognized. *United States v. Nixon*³⁴⁷ acknowledged its constitutional dimension, even while holding that in specific instances it might be overcome. A similar proposition underlies long-standing judicial assertions—again, susceptible of being overcome—that the decision processes of law-administrators are not to be inquired into on judicial review,³⁴⁸ and that the fifth exemption to the Freedom of Information Act,³⁴⁹ which in effect embodies the more general notions of executive privilege, should be read as accepting that privilege. “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process.”³⁵⁰ Congress’s enactment of that exemption—as its general acknowledgment of a presidential claim to privacy of communication with officers of government that may be overcome only on its demonstration of a specific need for legislative purposes³⁵¹—signals its own acceptance of the general principle.

Perhaps it will be thought that the more general form of executive privilege—that which protects the decisionmaking process as distinct from national secrets of defense or foreign relations³⁵²—is limited in its provenance

347. 418 U.S. 683 (1974), discussed supra text accompanying notes 174–76.

348. *United States v. Morgan*, 313 U.S. 409 (1941), requires a strong showing of bad faith or improper behavior to go behind administrative findings made. See *Camp v. Pitts*, 411 U.S. 138 (1973).

349. 5 U.S.C. § 552(b)(5) (1982); see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 & n.2 (1975) (exempting “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”).

350. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) (quoting *United States v. Nixon*, 418 U.S. at 705).

351. Whether Congress is obliged to accept particular claims of executive privilege is, of course, an entirely different matter; as in *United States v. Nixon*, the President is unlikely to be left as the final judge of the matter. Nonetheless, as in the recent imbroglio over privilege claims leading to the resignation of Anne Burford Gorsuch, President Reagan’s Administrator for the Environmental Protection Agency, see *N.Y. Times*, Mar. 10, 1983, at B12, col. 1, these issues tend to be compromised in political give-and-take—both sides perhaps realizing that there is much to be lost from the definitive judicial resolution that ultimately might otherwise be required. The fact of that play in the joints, again, is a central indicator of the health of the constitutional scheme: if the outcomes were or could be one-sidedly foreordained, the implication would be an incapacity on the part of the President to check the Congress or vice versa.

Congressional need must in any event be demonstrated to obtain judicial enforcement. See *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974); Fein, *Fighting Off Congress: A Bill of Rights for the Independent Agency*, 8 *District Law.* 37 (Nov./Dec. 1983).

352. The scope of executive privilege parallels the range of executive function. As a general matter, claims that information might compromise military or foreign relations interests of the nation have greater weight, and are less easily overcome, than claims that making public some

to the body actually deciding. That is, an agency to which Congress has delegated a decisional function might be entitled to protection of its own decisionmaking processes, but communications from the outside—specifically from the President—would be within the ambit of a proper claim of privilege only if the President were himself entitled to decide the matter and hence internal to the decision process. The basis on which a functional argument of that sort could be made for decisions of protected objectivity has already been indicated;³⁵³ as a general matter, however, the argument encounters the difficulty that the constitutional basis for the claim of executive privilege inheres in the Presidency itself—indeed, a requirement that the President himself authorize any claim of executive privilege formally made to Congress or the courts is generally accepted.³⁵⁴

As with the legislative veto and the independent regulatory commissions, a curious position taken by the White House (in this case during the Carter Administration) may serve to illustrate the problem of limiting privilege only to “executive” personnel.³⁵⁵ Congress was considering legislation to regularize the procedures for asserting executive privilege and, as it usually does, the Office of Management and Budget sought comments from all agencies, including the independents, on the proposal. The bill in question required a presidential assertion of privilege, and made no provision for claims by or on behalf of the independents. The NRC’s responsibilities for nuclear materials safeguards and export licensing had resulted in its having possession of a substantial body of sensitive foreign relations and intelligence information, information subject to the stronger form of executive privilege claim, and it seemed appropriate that it be brought within the umbrella of the procedures being established. A comment recommending such an amendment was proposed. The view from the Department of Justice, however, was that because the NRC was independent it could not hope to have the privilege available to it, and therefore the comment should not be made.

Viewed as a political judgment about what positions the administration could afford to take with the Congress, this advice is no different than the decision not to impose the cost-benefit analysis regimes of Executive Orders 12,044 and 12,291 upon the independent commissions.³⁵⁶ As a legal analysis, however, it is extraordinary. The information in question was no less sensitive

internal dialogue about law-administration will impair the President’s capacity to secure candid advice from his associates. This difference is well reflected in the wording and interpretation of exemptions 1 and 5 of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(1), (5) (1982). See W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 592–93; *supra* note 11. We are here concerned with the latter form of claim.

353. See *supra* text accompanying notes 316–18.

354. Failure to recognize that his argument is inconsistent with the Constitution’s vesting executive authority in a single President is the principal flaw in the otherwise perceptive discussion appearing in Fein, *supra* note 351.

355. I learned of this incident, as a number of others, during a period of service as General Counsel to the Nuclear Regulatory Commission.

356. See *supra* notes 76–78 and accompanying text.

nationally in the NRC's hands than it had been in the hands of the Department of State; it concerned issues of high controversy, respecting which congressional demands were readily anticipable. To deny the possibility of a claim of executive privilege seems also to deny any obligation to the President on the agency's part to hold the matter in confidence. The implication, again, is that Congress has succeeded in fractionating government, producing law-administrators not related to the President in a way that permits recognizing in him the (politically enforceable) obligation of taking care that the laws be faithfully executed, and creating oversight relationships for itself with law-administrators in which the political resistance expected and generally forthcoming from the Presidency would be missing. If executive privilege is the President's, and it is in the Presidency that it has its constitutional source, then privilege is a relationship that must extend throughout all law-administration.

2. *Congressional Regulation of Executive Privilege.* — As *United States v. Nixon* underlines, the fact of executive privilege does not in itself establish the President's right to hold communications to him (or within the executive branch) confidential. Claims to acquire the information subject to the privilege or to deny confidentiality to consultations may equally be based on the Constitution, and in particular cases may be stronger than the privilege claim. The *Nixon* Court indicated that balancing judgments were required, finding there that a special need urged on behalf of criminal defendants overcame what was presented as a blanket, generalized claim of privilege made on the President's behalf.³⁵⁷ It was argued above, along similar lines, that a presidential claim of constitutional prerogative to communicate in private with a decisionmaker could be overcome by a congressional judgment that a given decision must be made "on the record" to assure its objectivity.³⁵⁸

Congress might have other reasons, apart from motives of power aggrandizement, to limit presidential communications to the agencies to which it had delegated decisional responsibilities, or to require any communications to be made publicly. While ostensibly the purpose is to communicate presidential views, such communications might be a means for injecting the views of politically influential private parties (the conduit problem). Communications are more often made in the name of the President than by the President himself, and Congress might believe that having staff persons making them presented unacceptable political risks or diffusion of authority (the staff abuse problem). Even outside the context of on-the-record proceedings, these risks, on the whole, could be thought to outweigh the gains to be had from informal and confidential lines of communication within the administration. This problem arises most acutely in the context of informal rulemaking, where it has already had a fair amount of focussed attention.³⁵⁹ Those analyses suggest both that wide scope exists for congressional judgment on the problem and—

357. See *supra* text accompanying notes 174–76.

358. See *supra* text accompanying notes 316–22.

359. See, e.g., Bruff, *supra* note 47; Nathanson, *supra* note 207; Verkuil, *supra* note 55.

what might be regarded as the parity-driven consequences of a judgment favoring controls—that it would be difficult to adopt more formal standards without making rulemaking far more cumbersome. Are there limits on Congress's authority to make and enforce such judgments?

a. *The Conduit Problem.* — The allegation that private presidential (and congressional) communication had permitted back door influence by special interest groups was a principal objection of the parties in *Sierra Club v. Costle*,³⁶⁰ a well-regarded D.C. Circuit decision reviewing the highly significant EPA rulemaking on sulfur emissions by coal-fired electric utilities.³⁶¹ Environmental groups feared that politically more powerful coal interests were having their views passed directly along, in private, as if they were the views of the President, or at least with the command that they receive respectful attention. National coordination can be understood as a rationale for presidential participation; serving as a conduit for the views of special interest groups in particular cases presents greater difficulties.³⁶² In *Sierra Club*, the court was able to rely on advice the Attorney General had given White House officials that their ability to consult with agency officials on rulemakings might depend on their undertaking not to serve a pass-along function,³⁶³ and that they should keep and make public records of materials they received from private sources to show their adherence to that undertaking. Because that advice appeared to have been followed, the court found the consultations not legally objectionable.³⁶⁴

While it recognized the constitutional stature of the claim of both “the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy,”³⁶⁵ the D.C. Circuit in *Sierra Club* also appeared to recognize the scope for judicial and legislative regulation of that power. It hinted that courts might inquire, using the discovery weapon, whether “conduit communications” had occurred. In the context of the Attorney General’s advice and its apparent acceptance, however, it declined to authorize that step “simply on the unsubstantiated hypothesis that some such communications may be unearthed thereby.”³⁶⁶ A presumption of

360. 657 F.2d 298 (D.C. Cir. 1981).

361. That rulemaking was also the subject of an extraordinary case study demonstrating (and decrying) the penetration of politics into the outcome. B. Ackerman & W. Hassler, *Clean Coal/Dirty Air* (1981).

362. See also, e.g., *In re Permanent Surface Mining Regulation Litigation*, 617 F.2d 807, 809 (D.C. Cir. 1980) (per curiam) (appeal from denial of preliminary injunction); Bruff, *supra* note 47, at 466 (National Highway Safety Administration).

363. 657 F.2d at 405 n.520.

364. *Id.* at 407–08; see also 44 Fed. Reg. 1355 (1979); Dep’t of Justice Memorandum to Cecil D. Andreus, Jan. 17, 1979, reprinted in *Legal Times of Wash.*, Jan. 29, 1979, at 32, col. 1.

365. 657 F.2d at 405.

366. *Id.* at 405 n.520. It might be noted that the Reagan Administration has taken a less formal view, only advising officials to make sure persons who make contact with them have placed in agency files any factual data they mean to present, and making no effort to preserve a paper trail. See, e.g., Hearings, *supra* note 76, at 47 (Testimony of James Miller, then Director of the President’s regulatory reform effort and now Chairman of the FTC):

regularity would first have to be overcome, in light both of general hesitation to put agency motivation on trial³⁶⁷ and of the "extraordinary caution" courts should employ when article II considerations are present.³⁶⁸ And while the court seemed to indicate that a statutory requirement of disclosure would be enforced,³⁶⁹ it also anticipated that such a statute would have to respect the need for parity. Congress could "convert informal rulemaking into a rarified technocratic process, unaffected by political considerations,"³⁷⁰ but at the cost of confining congressional as well as presidential power.

Thus, Congress's broad authority to adopt legislation to structure the behavior of the President and agencies cannot be considered independently of the same constitutional concerns as motivated the *Sierra Club* court to decline to intervene. The argument for controlling intra-executive contacts depends on viewing rulemaking as an apolitical process, like a trial, in which decision turns on the outcome of a public contest over facts, rather than on intuition and judgment based on experience in the community. That vision is tenable, but has several shortcomings. First, it represents a sharp departure from current understanding, and implies an equal constraint for Congress. Second, it may not reach past the conduit issue, or is at least far weaker respecting expressions of official views. Third, and most important, significant difficulties would arise if Congress sought to go beyond requiring contacts to be made public, to a prohibition of presidential contacts. A requirement of openness would satisfy procedural if not structural concerns: it would supply a full record for judicial review, and full appreciation in the community of the data on which the agency has relied; it would also provide a means for checking

As you can see, the basic principle is that any factual information given to OMB and the task force should also be transferred to the agencies to be included in their rulemaking files. Furthermore, any time we procure facts or perform analyses based on such facts which impact on our consultations with agencies, we also transmit such information for inclusion in the record.

See also *id.* at 102 (OMB has no intention of maintaining a log of contacts); General Accounting Office, Report to the Chairman, Senate Comm. on Governmental Affairs, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Cost of Regulations iv, 52-54 (Nov. 2, 1982) (criticizing OMB's ex parte contacts and lack of written comments); M. Eads, *The Crusade that Backfired* ch. 6 (forthcoming); Hearings, *supra* note 76, at 17 (June 11, 1981 memorandum from David Stockman entitled "Certain Communications Pursuant to E.O. 12291, Federal Regulation").

367. *Sierra Club v. Costle*, 657 F.2d at 405 n.520; see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Morgan v. United States*, 304 U.S. 1 (1938).

368. *Sierra Club v. Costle*, 657 F.2d at 407. That is, recognizing the President's proper constitutional role, the court also recognized that permitting easy litigative intrusion would necessarily impair his exercise of that role.

369. See, e.g., 657 F.2d at 405-07:

We assume, therefore, that unless expressly forbidden by Congress, such intra-executive contacts may take place But in the absence of any further Congressional requirements, we hold that it was not unlawful in this case for EPA not to docket a face-to-face policy session involving the President and EPA officials during the post-comment period

370. *Id.* at 408.

that the pass-along function was not being served while substantially respecting the President's claim to consultation under the "opinions in writing" clause. It would be hard to reconcile a prohibition of presidential contact either with that provision, or with the general purpose to make of the President a unitary chief executive.

Might not the President insist that policy advice at least, as distinct from factual assertions, remain confidential? Both written and oral opinions from the agencies, and any responses the President may make, have the character of communications about which executive privilege claims could be made, even though the claims would not invariably be respected.³⁷¹ Even apart from the risk of purposeful Congressional disruption of the balance of powers within government, any disclosure requirement must balance gains for judicial review or public acceptance against possible losses in the candor and flexibility of the government's decisional processes. Without attempting to resolve here the *United States v. Nixon*³⁷² balance, I would note that a sweeping and general congressional judgment about the benefits of openness for public acceptance of administrative acts does not present as precise a claim as a prosecutor's need in connection with a particular criminal proceeding. It neither embodies explicit constitutional values corresponding to the criminal defendants' assertions in that case nor reflects a particularized need to override the executive's claim to privilege. On the President's side, arguments of varying strength can be imagined: the argument against a requirement that outside contacts be disclosed—the conduit function—is evidently weaker than that against disclosing all contacts, even those from within; required exposure of factual submissions, less objectionable than required publicity for advice. On the congressional side of the ledger, one notes that statutory requirements of publicity have a greater tendency to defeat the intended tensions among the branches by greatly reducing presidential power across a broad spectrum of activity than does an issue-specific judicial determination that a presumptive privilege has been defeated. Certainly, given the President's constitutionally based claim for confidential consultation with law-administrators, Congress could not expect to require openness for presidential communication only. If it required all presidential communications to be open without equally requiring that of congressional communications, the suspicion would be inescapable that an assault on the Presidency, rather than an assurance of fair or acceptable procedure, was at the root of the measure; and accordingly, it ought not survive.³⁷³

371. See Bruff, *supra* note 47, at 505; Verkuil, *supra* note 55, at 958–59.

372. 418 U.S. 683 (1974).

373. A similar issue, respecting which even stronger doubts might be raised, is suggested by a proposal discussed in connection with recent regulatory reform legislation to prohibit any officer of the United States from requiring independent commissions to submit legislative proposals (or testimony or comments) for executive branch coordination prior to their submission to Congress. The President may not only require opinions in writing on any subject; he is also to recommend the legislation he judges necessary and expedient. The proposed constraint significantly hampers

Could Congress require the President to participate only in the ordinary course, requiring that any comments or advice be filed not only openly but also within the time frame allotted for public participation?³⁷⁴ Again the values beyond interbranch warfare to be served by such a requirement, such as the facilitation of judicial review, require at least that the same constraints be placed on congressional interventions.³⁷⁵ The President's responsibility to coordinate the activities of all government, however, sets him apart from private and congressional actors. The responsibility cannot be well exercised unless he, as well as the responsible agency, is in a position to assess the various responses made in the rulemaking and even the agency's preliminary reaction to those responses. Congressional imposition of strict time requirements, then, could require a burden of justification beyond that to be faced in supporting a requirement of openness.

b. *The Staff Abuse Problem.* — In addition to the conduit problem are the difficulties introduced by the fact that not all views attributed to the President, even views emanating from the White House, are in fact his. Junior staff members may be anxious to satisfy imagined desires of the President, knowing that he does not have the time to be consulted on all issues. Less creditably, they may be eager to demonstrate their power to the outside world. Of course the officials at the other end of the telephone line know that "the President wants" is not always meant literally; yet the cost of testing the waters can be high. Aware of these potentials for misunderstanding, if not abuse, might Congress provide that presidential prerogatives of participation must be exercised personally?

We saw earlier that one result of *Nixon v. Fitzgerald* was a sharp distinction at the level of quasi-constitutional prerogative between the President and even close "elbow-aides."³⁷⁶ If a similar distinction were employed in this context, it would permit the restriction suggested—in the process, effectively denying the President the capacity to perform his functions by precluding him

his ability to do so by effectively depriving him of the possibilities of consultation and coordination. A requirement that agency proposals be revealed with the President's package, like the equivalent requirements now common respecting budget requests, would not raise these issues; nor would a provision requiring the agency to wait only a reasonable time before making its submission. Either of these measures would also restrict the President's political authority with the agencies concerned; the difference lies in their preservation of his leadership and initiative.

374. Dean Verkuil discusses this issue, Verkuil, *supra* note 55, at 985, and recommends:

There should be no requirement that these written contracts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally promulgated. Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment period itself.

Id. at 987-88 (footnoted omitted).

375. Acceptance of that proposition could well make use of this option more sparing—limited, for example, to rulemaking conducted on the record, where the judgment that apolitical approaches are required is strong.

376. See *supra* text accompanying notes 221-36.

from delegation. This result is troubling. Even the most sensitive issues of national security must be brought to the point of presidential decision by staff, who assemble data and views, and then winnow and shape them for the President, often after energetic and even oppressive consultation with the responsible agencies and departments. Presidential interventions in agency proceedings will almost always be performed by someone other than the President, acting in his name. The Constitution embraced the President's political accountability as an officer whose performance might be measured by the electorate—a concept consistent with delegation, so long as he may fairly be held to account for the delegates' performance. Indeed, anticipated delegation is the point of the cryptic references to "Departments." And the near-impeachment of Richard Nixon dramatically confirmed the reality of that responsibility.³⁷⁷

Such a constraint on presidential action would not meet the test of parity unless congressmen equally constrained their own staffs. The political cost to Congress of taking such a step, given the apparent importance of "casework" and oversight for legislators' priorities,³⁷⁸ would almost certainly preclude it *if* the parity notion applied. Yet the Court's reasoning in the *Fitzgerald* cases³⁷⁹ suggests it does not. The presidential aides in *Harlow* had relied for their claim of absolute privilege on *Gravel v. United States*,³⁸⁰ a case involving assertions by a Senator and his aides of privilege under the speech-or-debate clause of the Constitution.³⁸¹ The *Gravel* Court had said in dictum³⁸² that the clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."³⁸³ In the *Fitzgerald* cases, only the Chief Justice accepted the evident parallel to *Gravel*, and he noted it in terms too sharp to pretend his eight colleagues had not rejected it. One may say the Court erred, or that its judgment was affected by the particular executive conduct alleged in the *Fitzgerald* cases, or that the difference between qualified and absolute privilege is not so substantial as to impair the President's capacities to maintain his office and to remain an effective political competitor to Congress. Yet if Congress can legislate that it may, but the President may not, employ staff to

377. Dean Verkuil suggests a hierarchical approach, distinguishing interventions by the President himself from interventions by senior White House officials, and the latter, from interventions by staff aides. Verkuil, *supra* note 55, at 987–88; see also Roads to Reform, *supra* note 55, at 155–57 (dissenting remarks of former Secretary of Transportation William T. Coleman, Jr.). The distinction is an attractive one but its effect, again, is essentially to deny the possibility of delegation.

378. R. Arnold, *supra* note 72, at 26–27; M. Fiorina, Retrospective Voting in American National Elections 204–10 (1981); Fiorina & Noll, *supra* note 72, at 256.

379. See *supra* text accompanying notes 221–37.

380. 408 U.S. 606 (1972).

381. U.S. Const. art. I, § 6, cl. 1.

382. It found the clause not properly invoked in the circumstances of the case. 408 U.S. at 622.

383. *Id.* at 618.

carry out oversight roles, the President's capacities both as chief executive and as political rival would be significantly undercut.

D. *The President's Constitutional Claim to Direct Agency Judgment*

The discussion to this point has largely assumed the proposition sometimes thought to have been settled by *Kendall v. United States*³⁸⁴ that Congress can if it wishes place administrative duties wholly in law-administrators, not subject to direction by the President. But *Kendall* resolves that issue only for settings in which administrators have no discretion.³⁸⁵ Granted that the agencies and the President are each bounded by law in their exercise of discretion, what directory authority does the President have *within* these boundaries?³⁸⁶ As in the inquiry into executive privilege, it may be useful to consider the issue in two aspects: first, whether in the face of congressional silence, presidential authority to direct or at least shape the exercise of law-administering discretion may be inferred; second, if so, whether any limits on congressional ability to override that direction by statute may be found. As in the case of executive privilege, it is not possible to be more than suggestive about a subject on which many have written.

1. *Presidential Direction of the Exercise of Administrative Discretion as a Claim Applicable to All Law-Administrators.* — Issues attendant to the President's claim to direct the exercise of administrative discretion are well posed by the increasing level of White House involvement in major agency rulemaking through the imposition of requirements to engage in economic analysis of the likely impact of proposed rulemaking, subject to possible White House review.³⁸⁷ President Carter's Executive Order No. 12,044, an initiative broadly supported by the legal community,³⁸⁸ first imposed this requirement in detail. The order created presidential review mechanisms essentially procedural in character; while further analysis or reports could be requested and the White House might call forceful attention to deficiencies thought to exist in agency drafts, the Order suggested no effort to direct how the rulemaking agency must exercise its judgment as to outcome, once a satisfactory analysis was in hand.³⁸⁹ President Reagan's Executive Order No. 12,291, issued soon after he took office, took the further step of imposing a

384. 37 U.S. (12 Pet.) 524 (1838), discussed *supra* text accompanying notes 127–30.

385. *Id.* at 609–14.

386. The concern is hardly a new one. See R. Cushman, *supra* note 140, at 680–88; E. Redford, *supra* note 167, at 12–33; Byse, Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies, 29 Ad. L. Rev. 157 (1977); Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395, 1409–14 (1975).

387. See *supra* notes 76–78 and accompanying text.

388. See, e.g., Roads to Reform, *supra* note 55, at 79–88 (recommendations for increased presidential participation in rulemaking).

389. It is of course difficult—and was understood to be difficult—to enact a conclusion shown to be excessive, inefficient, or ineffective by an analysis that will be part of a rulemaking record; nonetheless, there was no mistaking whose judgment was to be exercised in that regard.

standard of judgment to be exercised on the basis of these analyses, "to the extent permitted by law": agencies were to adopt rules only if they were both cost-beneficial and benefit-maximizing.³⁹⁰ Although not formally applicable to the independent regulatory commissions, both executive orders were widely followed by them; both Presidents made clear that they had excepted the independents to avoid stirring up a political fuss, not because either believed he lacked authority to apply the order to the independents.³⁹¹

The stated rationale for these orders was not that the President might wish to substitute his judgment for the agency's on particular issues delegated to it, but that they would permit him to bring to bear balancing and coordination perspectives inseparable from the notion of a single chief executive. Acting on their own, agencies are most unlikely to achieve effective balance. Although the EPA, for example, could "take account of" the concerns of the NRC in adopting rules respecting radioactive wastes and the NRC, in turn, could consider the perspectives of the EPA, each would act from its own perspective. Uniformity of outcome would be unlikely even though both agencies would assert that they were taking account of the other's need and would be making genuine efforts to do so. Nor would either have authority to enforce its conclusion in the other agency. Such problems arise daily and may involve a significant number of agencies, each with its own perspective on a given regulatory issue or national problem. Interagency study groups proliferate, and each must have a chair. Memoranda of understanding are entered, and each agency must have an impetus to accommodate and some reason to expect enforcement of the result. Only the President can supply these services. Even where the courts might be called on to assist in resolution, their processes could take years that simply are not available to those responsible for implementing statutes today.

The power to balance competing goals—and the concomitant power to influence at least to some degree the agencies' exercise of discretion—can only be the President's; leaving the balancing functions in the agencies would create multiheaded government, government with neither the capacity to come to a definitive resolution nor the ability to see that any resolution is honored in all agencies to which it may apply. This outcome does not vary with whether or not the agencies are denominated independent. Once one has acknowledged that any discretion conferred must be exercised within the legal bounds set for it, failure to recognize the President's claim to shape its exercise would deny central premises of constitutional structure as sharply as would a denial of Congress's claim to set the legal bounds.

There are other practical reasons for granting the President the power to shape administrative discretion. Individual agencies almost necessarily lack the political accountability and the intellectual and fiscal resources necessary to achieve such balancing and coordination. Relying on them to do so would

390. Exec. Order No. 12,291, § 2, 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

391. See *supra* notes 76–78 and accompanying text.

produce more costly and less responsible government, in which interagency disputes would be more likely to arise and less amenable to abiding resolution. For example, the NRC, in order to carry out its responsibilities in the licensing of nuclear exports,³⁹² could simply accept the State Department's advice on the diplomatic aspects of proposed exports and the intelligence agencies' advice on the possible consequences of exportation for the proliferation of nuclear weapons. By statute, however, the NRC is required to reach independent judgments,³⁹³ and that has required it to develop its own miniature Department of State and intelligence-evaluation apparatus. Whether these offices are more expert than the agencies whose judgments they review is surely open to doubt; to say that the judgment of the officials in their charge is less likely to be influenced by extraneous factors may be another way of saying that they will not see or be responsible for all the implications of the judgments they are to make. What is certain is that these officials add to the bulk of government, to the time required to make decisions, and add to the volume of disputes government must resolve in order to act, as well as serving to diffuse governmental responsibility. In order to carry out the responsibilities placed upon them, they must seek additional information, question the judgments of those who supply that information, and in some instances disagree with these judgments. The result may, on balance, be improved decision; Congress, in establishing this mechanism, obviously thought the existing decisionmakers were too complaisant. The point here is to call attention to the costs of time, manpower, and added disputatiousness that must be paid to achieve those "improvements."

One response to arguments such as these is often couched in terms of the high political content of White House direction. Thus, urges former Secretary of Transportation William T. Coleman, Jr.,

I believe this analysis [in support of adopting formal procedures for presidential override of agency judgment] . . . overestimates the objectivity of the President's staff Many members of the White House staff also undertake single-mission objectives or bring with them, or learn on the job, program biases. . . . Even staff generalists often adopt specific issue orientations and are willing to sacrifice . . . conflicting . . . objectives in pursuit of whatever presidential priority has been assigned to them. Even more "ominous" is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may be simply the position that will most ensure reelection of the President. . . . Such an advisor—immune from public scrutiny and congressional accountability

392. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155 (Supp. V 1981). From 1975 until 1978 this authority was final, free of presidential direction; the law was changed in 1978 to permit the President to override the Commission's failure to issue the proposed license on a timely basis if he "determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security." 42 U.S.C. § 2155(b)(2) (Supp. V 1981). The President's judgment, in turn, might be overridden by congressional action of a sort undermined by the decision in *Chadha*. *Id.*; see W. Gellhorn, C. Byse & P. Strauss, *supra* note 2, at 142 n.4, 642 n.1.

393. 42 U.S.C. § 2155(a)(2) (Supp. V 1981).

. . . and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.³⁹⁴

A second response is that the White House lacks the resources to make the detailed judgments inherent in administration. For example, in technologically complex rulemakings, like those at the EPA, many of the most important decisions are incorporated into the assumptions of the technological model used. The White House does not have the expertise necessary to comment on those rules and “[w]ithout highly capable technical assistance to both resurface and reanalyze those assumptions, the review that is conducted . . . may end up being inconsequential and superficial but will have imposed a blizzard of additional paperwork by all concerned.”³⁹⁵

While justified, these concerns underestimate the need for coordination and review and the inability of any body but the President to fulfill that need. “Each agency has a natural devotion to its primary purpose . . . no matter how many statutes . . . say that it shall ‘consider’ other interests as well. Someone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together”³⁹⁶ These claims made for presidential direction do not necessitate complete displacement of agency judgments or an assertion of White House expertise. Coordination and substantive suggestions—albeit backed up with the influence of the Presidency—are not incompatible with the agency remaining ultimately responsible for the decision. The OMB supervision of the impact-analysis process under Executive Order No. 12,291, for example, recognizes (as it must) that the authority to issue the rules subject to the impact analysis process remained in the agency head,³⁹⁷ subject to whatever political discipline

394. *Roads to Reform*, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the commission’s recommendations) (footnote omitted).

395. *Hearings*, supra note 76, at 28 (testimony of former EPA General Counsel Bernstein) (criticizing Exec. Order No. 12,291).

396. *Roads to Reform*, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the commission’s recommendations). In his 1962 Oliver Wendell Holmes Lecture at Harvard, Judge Friendly had taken a position similar to that of Secretary Coleman. Compare H. Friendly, *The Federal Administrative Agencies: The Need For Better Definition Of Standards* 152-55 (1962) with *Roads to Reform*, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the commission’s recommendations). In *Roads to Reform* Judge Friendly explained that those lectures had been

devoted solely to the independent agencies. . . . If they made a mistake in the award of a particular broadcast license, or even in its policies with respect to such licenses, the nation would survive until Congress took remedial action

The federal bureaucracy has burgeoned to an extent not remotely contemplated seventeen years ago. . . . Moreover, whereas in the early 1960’s the focus was on agency decisions taking the form of orders after trial-type hearings, today’s emphasis . . . [is] with regulations avowedly of a legislative character.

Roads to Reform, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the commission’s recommendations).

397. Exec. Order No. 12,291, § 3(f)(3), 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

the President might bring to bear.³⁹⁸ Similarly, *Sierra Club v. Costle*³⁹⁹ accepted the possibility that the White House had been able to influence the agency's choice among several alternatives, each supportable on the basis of the materials in the rulemaking, through private conversations it held could remain private.⁴⁰⁰ What had not happened was a direct transfer of decision; if Administrator Costle had decided not to accept any advice he received and promulgated the rule as he wished it to be, the White House's sole recourse would have been to punish him in some way, paying whatever political cost was inherent in that action. Within the constraint of recognizing the domain of law, the proposition that there exists a single executive, responsible to the people through election and to the law through his oath faithfully to execute all laws, locates the coordination and dispute resolution function in the Presidency.

2. *Congressional Regulation of Presidential Direction of the Exercise of Administrative Discretion.* — Given that the President's political accountability was foreseen as both a principal check upon him and a source of his authority in political struggles with Congress, the risk that political considerations might enter into the President's oversight of administrative discretion seems a limited rationale for congressional control of that oversight. At the least, for the reasons already indicated, one would think the rationale unavailable wherever Congress had not been equally careful of its own political involvement.

Just as with executive privilege, the key is to identify those congressional statutes that might unbalance the distribution of authority at the apex of government by crippling existing informal controls; there is no a priori need for statutory authorization of presidential direction. Although the recent proposals for presidential override of some important agency policy decisions⁴⁰¹ appear to be a dramatic innovation, the President's informal influence over the daily operation of government is already pervasive. In fact, these proposals would restrain rather than confer executive authority; the resolution of interagency dispute and coordination of agency activity in conformity with centrally determined executive policy are already daily activities. The activities are informal because informality makes for more efficient deployment of the President's limited resources; formalities mean time, people, and added disputes to be resolved. Such activities are not highly visible, because of the danger that, if they were, Congress would encumber them in ways restricting the effectiveness of the President's coordinative apparatus. The White House does not have to be explicit with an agency about results; it has enough power

398. Cf. *United States v. Nixon*, 418 U.S. 683, 694-97 (1974) (President's authority over Special Prosecutor limited by Department of Justice regulations granting him "unique authority and tenure").

399. 657 F.2d 298 (D.C. Cir. 1981).

400. *Id.* at 408.

401. See *Roads to Reform*, *supra* note 55, at 79-83; Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 Tul. L. Rev. 830 (1982).

to act much more indirectly using the points of contact already described: the opportunities to persuade and cajole; the loyalties that may arise from appointment; and the probable shared sense of respect and of national mission.⁴⁰²

In sum, Congress's ability to limit presidential directory power is limited not only by the general need to maintain a tension between the named branches, but by the need for the President to be able effectively to coordinate all agency decisionmaking. This need is reflected in the President's presently wide but informal directory power and Congress's acquiescence to it.

CONCLUSION

The basic conclusion was asserted at the outset: given the realities of contemporary government and the inescapable constraints of constitutional text and context, we can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches, each endowed with a unique portion of governmental power and employing no other. That apportionment was made, but it was made only as to those actors occupying the very apex of government—Congress, President, and Supreme Court. The remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.

The first judgment leaves Congress free in particular cases to choose among a variety of relationships the President might have with those who actually do the work of law-administration; whatever relationship is chosen,

402. This directory power is related to, but not derivative from or coincidental with, his removal power. Thus, the propositions established respecting congressional control of presidential oversight are limited ones about the President's removal authority. There are some overlaps, of course, between the powers. A court might agree, for example, that a commission's refusal to perform a requested economic analysis of the impact of a proposed rule, to publish an agenda of its intended rulemaking activities for the coming period, to await the results of OMB review of agency comments on a rule, or to attend a meeting called to discuss them gave rise to "cause" for removal of one or more commissioners from office. The President also possesses in most cases the further authority to rotate the chairmanship among the sitting commissioners as a means of enforcing his displeasure with an incumbent regardless of cause. But he does not often use it. Neither does he often discharge secretaries of executive departments, whose response to his directives is invariably less than perfect, who often in their own political necessities must resist a course the President would have them take, and who are the ones empowered to sign any adopted rule. The secretaries, too, possess a measure of practical and legal independence. Thus, his removal power, like the directory power, does not vary whether the President is dealing with executive or independent agencies.

however, must be sufficient both to warrant characterization of the President's role as unitary and to justify holding him accountable for the results of administration. From such reflections of the first judgment as appear in the constitutional text, one can derive a few necessary dimensions of that relationship: the appointment power, a structure within which effective and confidential (absent special reasons) consultations may occur and, in the ordinary case, some degree of participation in the decisionmaking process.

The second judgment suggests constraints on the rationales Congress may employ for making law-administration remote from the President. In some circumstances, most commonly those in which we think fairness to litigants requires careful observance of separation of functions within an agency, a congressional decision to insulate agency judgment from the President will in fact connote a decision to exclude *all* politics, legislative as well as executive. This rationale seems generally persuasive, and while even such exclusions might be questioned in some circumstances, the very process of observing parity of political treatment will restrain Congress from precipitous removal of agencies from presidential control. What the second judgment strongly suggests, in any event, is that such parity must be observed. Congressional removal of an agency from political relationships with the President while such relations were maintained with the Congress would signal conditions in which the intended competition and tensions among the constitutionally named heads of government would tend to be defeated.

When the two judgments are taken together, it becomes clear that parity is only a minimum: the President has an independent claim to control the execution of government to balance Congress's independent claim to structure it. Communication, coordination, even direction are as much the characteristic modes by which an executive exercises oversight as are hearings and the other tools of statute and budget working for a legislature. Balance between President and Congress in the work of law-administration can only be maintained by assuring settings in which these characteristic relationships may be effective.

With so large a subject and so rich a history, I do not pretend to have done more than scratch the surface of possibilities. Nonetheless, the inquiry—and the reunderstanding it connotes—seems important. The formalistic view of the place of agencies creates assumptions and beliefs that would change if all agencies were viewed as essentially under the control of all three named bodies. For example, the *political* differences between the Federal Aviation Administration (in the Department of Transportation) and the Civil Aeronautics Board (an independent commission) seem to derive in part from the CAB's belief that Congress may consider the CAB entitled to be more independent of presidential direction than the FAA, which operates in a framework of expectation that it is bound by his directives. Even if the President believes he has directory authority over the CAB, exercising that authority nonetheless will require the playing of political chips in his dealings with Congress; the stakes in that game, which include the possibility of added congressional controls over the executive departments, may be too high to

justify the play. Reunderstanding the issues in checks-and-balances terms—eliminating the illusion that agency structure depended on placement rather than relationship—could alter the expectations which underlie this political by-play, and in that way work for continuation of the balance between President and Congress that lies at the heart of the constitutional scheme.

Yet one ought not to expect, or even wish, these issues soon to be resolved. The expectation would be misplaced, because even bringing such questions to court requires a combination of political will and circumstances. Whether and in what circumstances simple disobedience to a presidential directive in rulemaking constitutes “cause” for dismissal, for example, can be tested only following the dismissal from office of a commissioner who is then motivated to fight his dismissal through three layers of courts and the existence of circumstances persuading the Court to grant certiorari—a combination more easily frustrated than attained. The wish would be misplaced because, as must already be evident, the imprecision of the relationship between President and Congress is at the heart of the mechanism by which the balance of the constitutional structure is maintained. It is not hard to *say* that the central issues are the unitary direction of law-administration, political responsibility for the whole within the constraints of law, and a tension between Congress and President in which neither is able to become dominant. Determining when the presidential capacities necessary to maintain that tension have been threatened will rarely be other than a difficult act of judgment.